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CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF THE

STATE OF TEXAS

DURING THE

TYLER TERM, 1879, AND THE EARLY PART OF THE GALVESTON
TERM, 1880.

REPORTED BY

JACKSON & JACKSON.

VOL. VII.

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Rec. May 7, 1880

COURT OF APPEALS OF THE STATE OF TEXAS.

PRESIDING JUDGE :

HON. M. D. ECTOR.¹

HON. JOHN P. WHITE.²

JUDGES :

HON. C. M. WINKLER.

HON. JOHN P. WHITE.²

HON. GEORGE CLARK.³

ATTORNEY-GENERAL :

GEORGE McCORMICK, Esq.

ASSISTANT ATTORNEY-GENERAL :

THOMAS BALL, Esq.

CLERKS :

JAMES L. WHITE, AT AUSTIN.

THOMAS SMITH, AT TYLER.

CHARLES S. MORSE, AT GALVESTON.

REPORTERS :

A. M. JACKSON.

A. M. JACKSON, JR.

¹ Died October 20, 1879.

² Chosen presiding judge November 8, 1879.

³ Appointed November 8, 1879.

1. The first part of the paper is devoted to a general discussion of the problem.

2. The second part is devoted to a detailed analysis of the case.

3. The third part is devoted to a detailed analysis of the case.

4. The fourth part is devoted to a detailed analysis of the case.

5. The fifth part is devoted to a detailed analysis of the case.

6. The sixth part is devoted to a detailed analysis of the case.

7. The seventh part is devoted to a detailed analysis of the case.

8. The eighth part is devoted to a detailed analysis of the case.

9. The ninth part is devoted to a detailed analysis of the case.

IN MEMORIAM.

DEATH OF HON. M. D. ECTOR.

On the 29th of October, 1879, while in official attendance, at Tyler, upon the Court of Appeals, the Hon. M. D. ECTOR, its first presiding judge, departed this life after a brief illness. Though widely known that the exhausting labors of his position had greatly impaired his health, and that neither physical suffering nor friendly remonstrance could detain him from his post, the event which thus terminated his useful and honorable career came with the suddenness of a surprise, and was instantly and universally recognized as a public calamity of no ordinary moment. To the city of Marshall, his home for many years, he was borne by his brethren of the Court of Appeals, the justices of the Supreme Court, the Commissioners of Appeals, the bar of Tyler and attendant counsel, and a numerous cortege of citizens; and there, amidst a community to which he was endeared by every attribute which extorts esteem or inspires affection, and with every tribute that respect and love could offer, his honored remains were consigned to earth.

Upon the bar of Tyler, with which, in various capacities and during many years, Judge ECTOR had been intimately associated, it devolved to give expression to the feelings and the sentiments which everywhere and from all classes throughout the State of Texas were elicited by the intelligence of his death. From among its number the Hon. George W. Chilton was selected to present its resolutions

to the Court of Appeals, and on the 1st of November, 1879, he discharged that duty in the following terms : —

YOUR HONORS: In asking the question what means that empty chair in the centre of your judicial dais, all covered by the sable drapery of mourning, I am answered by the saddened faces and tear-bedimmed eyes which surround me. Death, the grim tyrant of nature, has been amongst us, and has placed his chilling hand upon one we loved. Yes, true to his mission and reputed love, he has again stricken at a bright and shining mark, and with his relentless scythe has mown down, in the prime of life, in the zenith of his illustrious manhood and usefulness, one of the brightest ornaments of society, most illustrious, dauntless, and humane of soldier heroes, a noble, generous gentleman, an upright judge. The Hon. M. D. ECTOR, the presiding justice of this court, is dead. No more shall his manly form be seen in this hall; no more will that now vacant chair hold the form of one who in life was with you, with us all, a beacon light of goodness, of purity, a friend, counsellor, and guide. He rests from his labors and conflicts. Triumphs and honors can allure him to earth no more. His mortal remains now lie covered with the dust of his loved adopted State, and will there moulder away; but his lofty character, his example and influence, will live, and ever remind us that manly sincerity, integrity, and honesty of purpose ennoble and exalt the possessor more than high position and earthly honors. M. D. ECTOR was born in Putnam County, Georgia, in 1822, was educated at Centre College, Kentucky, and was admitted to the practice of law, in his native State, in 1844. He served one session in the Georgia State Legislature, I think in 1846, after which time he spent a short time in California, and then, about 1849, came to Texas, where he has lived ever since, serving his people with distinguished ability and fidelity in many exalted and responsible positions, as citizen, lawyer, legislator, soldier, and judge, in none of which did he ever disappoint the expectations of friends or country.

I am deputed by a meeting of the local bar of Tyler to present to the court of which the deceased was presiding judge resolutions which were by them this morning adopted. I now do so with mournful pleasure, and in asking you to give to his brethren of this bar a memorial page upon the records of your court, made sacred to the memory of your loved co-laborer and brother, I know that your grief-stricken hearts will beat in unison with my own when we reflect that all this, however sincere, is but a poor tribute to the transcendent virtue of our brother when living. In your individual griefs you are assured of the sympathy of those whom I represent; and feeling that, at any time, the death of a pure man and upright judge occasions a blank which it is difficult to fill, we are forcibly impressed with the conviction that in an age like this, when a deviation from public probity is looked upon as a slight affair, when public men who have soiled their hands, oftentimes, instead of being denounced, have been indorsed by the people, the loss of a man who has no defilement upon his person nor a stain upon his garments is almost irreparable. I feel that the best wish I can express for your Honors, in closing, is that who-

ever may be associated with you as Judge ECTOR's successor may approach him in all the virtues, graces, and excellencies that he displayed during the three and a half years you were together upon the bench.

"To live with fame,
The gods allow to many, but to die
With equal lustre is a blessing Heaven
Selects from all her choicest boons of Fate,
And, with a sparing hand, on few bestows."

RESOLUTIONS.

WHEREAS it has pleased the Supreme Law-giver of the Universe to call from our midst, to His own courts on high, one of our most useful and efficient co-laborers in the enforcement of His divine precepts, adopted as the basis of all human legislation; and for the purpose of giving to the profession some evidence of the high appreciation and esteem in which the Hon. M. D. ECTOR was held by us, his life-long associates and professional brethren, and as expressive of our deep and sincere regret, so far as words may be adequate to their expression, which we feel in view of his sudden death, we, the members of the bar of the city of Tyler, place upon this sheet, as our individual and united voice, the following resolutions:—

Resolved, That we sincerely deplore the death of our esteemed brother, the Hon. M. D. ECTOR, which occurred at this place on the morning of the 29th of October, 1879, whilst he was in attendance upon the Court of Appeals of Texas as its presiding justice.

Resolved, That we, who have known him intimately for many years in all the varied walks of life, — citizen, lawyer, soldier, and judge, — bear cheerful testimony to his unblemished and blameless character in the one, his keen sense of honor and true application of his duties in the other, his eminent and courageous services as a soldier, and his ability and impartiality as a presiding judge.

Resolved, That the secretary of this meeting be instructed to send a manuscript copy of these resolutions to the bereaved widow of our late beloved brother, as a token to his and her orphaned babes that they mourn not alone, but that thousands share with her the heavy burden which the unswerving hand of death has placed upon her, only brought to enforced resignation by the remembrance of what has been said of Him, "The Lord giveth, and the Lord taketh away; blessed be the name of the Lord."

Resolved, That in contemplating the life and death of the deceased we are more than ever impressed with the beauty, force, and truth of that inspired declaration, "A good name is rather to be sought than great riches, and loving favor rather than silver and gold." M. D. ECTOR is dead. The record of a good life is complete. May that record perpetuate his virtues and the services he has rendered his country as long as time shall endure. With truth may we say of our departed friend,—

"He has done the work of a true man,
Crown him, honor him, love him;
Weep over him tears of woman;
Stoop manliest brows above him."

| | |
|--------------------------|--------------|
| THOS. W. DODD, Chairman. | |
| STEPHEN REAVES, | } Committee. |
| TIGNAL W. JONES, | |
| G. W. CHILTON, | |
| H. M. WHITAKER, | |

Resolved, That the resolutions just adopted by this meeting, expressive of our profound regret at the death of the Hon. M. D. ECTOR, be presented to the Texas Court of Appeals, of which the deceased was, at the time of his death, presiding

justice, and said court be requested to assign to the local bar of Tyler a memorial page upon which said resolutions may be spread, and that the clerk of the Court of Appeals be directed to draw a five-point star in the centre of said page, around the points of which shall be written M. D. ECTOR, and in the centre of said star shall be inscribed, "*Nomen Clarum.*"

Upon motion, G. W. Chilton, Esq., was appointed to present the above and foregoing resolutions to the Court of Appeals.

HORACE CHILTON, President.

W. T. WEAVER, Secretary.

N. W. FINLEY, Acting Secretary.

NOVEMBER 1, 1879.

ADDRESS OF THE HON. THOS. BALL, ASSISTANT ATTORNEY-GENERAL.

MAY IT PLEASE THE COURT, — In accord with the resolutions of the bar, formally announcing to the court the death of Presiding Judge ECTOR, it is a sad duty to refer to his past.

Born in Georgia, he left there in his early days, and finally found a home in Texas, pursuing the practice of law until interrupted by his country's call to arms in a cause he believed just and right. Through that four years' struggle he served with patriotism and distinction. At its close he returned to his adopted home, all hopes apparently dimmed by the policy inaugurated then and operated through the reconstruction laws. He stood amid the people as wise in peace as he was brave in war. Time, with its measured tread, marched on, until in 1876 he was elected to the Court of Appeals in Texas. Upon the organization of the court, he was by his associates made the presiding judge thereof. Again the star of glory, which first shone around him in fire and blood, burst upon him in renewed brilliancy. Firm as Marshall in the conscientious discharge of the high trust, with an impartial skill and exalted integrity, he determined all questions alike, without intruding on the least right of the lowest or conceding aught to the highest. For three years he worked and toiled with an assiduity which knew no bounds. As a monument to his industry, the reports of this court bear testimony; as an evidence with what unerring skill he held equipoised the scales of justice, his decisions bear witness. At the close of this court in June, 1879, he returned to the hearthstones of home, around which his children gleefully played. In fond delight, he saw bud by bud grow and blossom in the development of the child, as it stretched out the hand and wished for maturer years. But around this scene of earthly joy no barrier stood irresistible to the entrance of disease; it came, and laid its talons deep upon the system of our lamented judge. At times it seemed as if nature must succumb, but with that iron will and force of character peculiar to himself, he apparently was freed from the attack. But, like the insidious flattery of the artful parasite, it was only a lull to work a more certain destruction of its victim. From this apparent recovery he bid adieu to his household, and left for the field of duty. Inspired by that stern sense of honor which often impels one to action far beyond the physical powers, he hastened to his post of justice, assuming

at once its arduous labors and grave responsibilities; on and on he pressed with that devotion which only the patriot knows, the brave can bear, and the virtuous appreciate. Again, with tenfold vigor, disease came, and unabated in its attacks until the relentless tyrant, death, claimed him as its own. He sank to rest with the calm quiet of the Christian soldier and the upright judge.

To the profession he stands as a tower of honor worthy to follow; to the bench, one of its whitest roses. While his associates and friends may deplore his loss, let them profit by his noble example. To his widow and children his bright Christian and unsullied life, and high estimation in which man held him, they should find consolation; we bid them cherish the bright heritage, and not to mourn. "He has crossed over the river, and rests beneath the shade of the trees."

The Hon. George Quinan, Commissioner of Appeals, then addressed the court as follows: —

MAY IT PLEASE YOUR HONORS, — I am deputed by my brethren of the Commission of Appeals to convey to you some expression of our sincere condolence with you in the recent loss you have sustained in the death of your presiding judge. We can fully sympathize with you. We fully appreciate his worth, and we realize that his decease is a loss not only to this tribunal, but to us and all our people.

For myself, my acquaintance with Judge ECTOR was neither very intimate nor very prolonged. I first saw him on that occasion when, by the suffrages of a great convention of our people, he was placed in nomination for the high position to which he attained. I was impressed then with his modest demeanor, and the evident greatness of heart he displayed in the few words of thanks he returned to us for the honor, as he chose to term it, done to him. I now know that we honored ourselves in the deed. But it did not need a very intimate or a very prolonged acquaintance with him to be assured that on him virtue had "set her seal, to give to the world assurance of a man." Looking back now upon the brief term of my acquaintance with him, recollecting what I had heard of him from those who were of his bosom, and recalling that page in the history of our State and country which he has written with his sword and with his pen, I do not hesitate to avouch that in his proper person he illustrated three of the most exalted characters on earth, — the gentleman, the soldier, and the judge. In private life, the Christian gentleman, "*sans peur et sans reproche*;" in the field, the patriot soldier, the gallant commander of gallant men; in this high tribunal, the upright and inflexible yet compassionate judge. Of his private, domestic relations I may not speak. You, judges, who have so recently visited his home, made desolate, who have heard the widow's wail and the orphan's cry, you can tell how as a husband he was adored, and as a father how he was revered. I will not

draw aside the curtain from that sad scene. No words of ours, no message from this high tribunal, can soften their affliction or assuage their griefs. We can only pray that He "who tempers the wind to the shorn lamb," in this visitation of His Providence, will give them strength to bide "the peltings of the pitiless storm;" that He will command His ministering angels to hover round them with their heavenly wings, to dry their tears, and solace their sorrows; that He will indeed be "a father to the fatherless, and a husband to the widow."

In his intercourse with his fellow-men, his neighbors, and his friends, Judge ECTOR was one of the truest of men. He abhorred deceit or equivocation; he shrank from meanness and untruth, as one would recoil from the fangs of a venomous reptile. Of innate dignity of character, and occupying stations of command and elevation, he was yet affable and easy of approach. Rich only in the abundance of the good gifts and graces which adorned his character, he was liberal as a prince, and his hand was ever "open as the day to deeds of melting charity." How he was esteemed by his neighbors, his acquaintances, and friends, the mourning multitude your honors beheld which wept at his burial attests.

"None knew him but to love him,
None named him but to praise."

As a soldier, enlisting in a very subordinate position at the commencement of our late struggle, his early elevation to the command of a brigade attests his skill and the confidence his conduct had inspired. How he was beloved by his comrades, the touching incident of the simple gift which at their late reunion they forwarded to him at this place, and which he received but a little while before his death, abundantly illustrates. As a commander he was ever wary and watchful, regarding the safety and comfort of his command while he rashly disregarded his own. He was bold as the bird of Jove, yet gentle as the doves of Paphos. His mutilated body was the memorial of his gallantry and daring. In the thickest of the fight, where the leaden hail fell fastest, in the fiercest shock of battle, his voice was ever heard cheering on his men to deeds of knightly daring. His flashing blade, like the white plume of Henry of Navarre, was their rallying standard. At his command, —

"Theirs not to make reply,
Theirs not to reason why,
Theirs but to do or die."

He has fought his last battle! Sad and silent you laid him in his last resting-place in consecrated ground. There was no tap of muffled drum, or sound of vollied musketry, or boom of minute-gun. But he did not lack a soldier's obsequies. Wherever the electric telegraph flashed the tidings of his death, from a thousand breasts broke forth the notes of woe. From the eyes of war-scarred veterans fell tears to bedew his memory, and sobs and cries and bursts of anguish unrepressed were the warrior's fitting requiem.

As presiding judge of this tribunal how shall I speak of him? You, judges, who were in daily, nightly, and hourly intercourse with him can

bear witness how untiring, how patient, how laborious he was, and with what persevering industry he devoted himself to the business of his high office. Doubtless he taxed his physical powers beyond their strength, and so hastened his death. Often you have besought him to rest his jaded frame. But the sense of duty was his overpowering passion.

If I were to-day to compose his epitaph, I would write: Here lies one whose life was devoted to duty, and who died in the discharge of it. His opinions, as published in your reports, give ample proof of his learning and capacity. There he has made his record: *Exegit monumentum ære perennius.*

Conscientious, compassionate, yet inflexible, to his everlasting credit be it said he bore the scales of justice with an even poise, unmoved by favor and deaf as an adder to popular clamor.

He has pronounced his last judgment! There's a vacant chair at your side. We shall never again hear his step upon the stair, or listen to the gentle tones of his voice, or grasp his hand in friendly greeting, or mingle sweet counsel together. No more; ah, never more! He is gone, true-hearted gentleman, gallant leader of men, upright and accomplished magistrate! Ah, "who will wield the spear of Ulysses, or bend his matchless bow!"

Yet, assuredly, the good he did lives after him. He has left us the example of a blameless life. History will record his virtues and his worth. Such a man needs no other monument. What though no sculptured marble or storied urn adorns his resting-place? His memory is embalmed in our affections. He is enthroned in our hearts. He has a mausoleum more splendid than wealth or power ever built over potentate or prince.

At the close of his remarks he submitted the following resolutions: —

SUPREME COURT ROOM,

TYLER, November 1, 1879. }

By the Commission of Appeals:

Resolved, That whereas the Hon. M. D. ECTOR, presiding judge of the Court of Appeals, has departed forever from among us, in obedience to the behest of the Lord of the Universe, we, lately associated with him as fellow-laborers in a common service to the country, desire to unite and mingle with his fellow-citizens our with their heart-felt grief at his untimely death, and our profound regret for the loss it has occasioned to the whole State of Texas, and which is so painfully felt by the entire legal profession, of which he was one of the chief ornaments, which has sundered the affectionate ties which so bound and endeared him to his immediate associates and brethren of the Court of Appeals, as well as the honorable justices of the Supreme Court, and to the officers of those courts and the members of the bar belonging to the same.

Resolved, That in the life and character of the lamented dead we recognize that of a man of whom it was ever said, and said truly, that he was a true and honest gentleman, "the noblest work of God," a devoted patriot and a chivalric and gallant soldier; and yet one so rarely compounded of all choice elements in nature's alembic, so overflowing with the tenderness of human sympathy and all kindly sensibilities, as to distinguish him not less in private life as the affectionate companion and friend, and the devoted husband and loving father, than in his public career. All these qualities shone conspicuously in the bright and shining life of Judge M. D. ECTOR.

Resolved, That we deeply deplore the great loss which the State has sustained in the death of her honored hero, who was ever ready to offer his life in her service and who gave freely to her his limb and his blood; in the loss she has sustained by his death, in his recent not less honored and useful character as one of her most eminent jurists, administering ably and faithfully her laws; and we alike deplore the great loss that we, his brethren of the bench, his friends, his neighbors, and especially his late comrades in arms, sustain in parting with him now, never to meet him again, until we all, like him, "pass over to the other side of the river."

Resolved, That a copy of these resolutions be respectfully presented to the Court of Appeals of the State of Texas, with the request that they be spread upon the minutes of the court, as a slight and humble tribute of respect of the undersigned Commissioners of Appeals of the State of Texas, and that a copy thereof be forwarded to the widow of the deceased, to whom, in her deep bereavement and inconsolable loss, we tender our sincere and heart-felt sympathy and condolence.

For the Commissioners.

RICHARD S. WALKER, *Presiding Judge*

After which the Hon. John P. White, acting presiding judge, in behalf of the court, said:—

GENTLEMEN OF THE BAR: We should be doing great injustice to our feelings did we not respond to the resolutions you have offered and the kindly sentiments expressed in connection with their presentation. To us this is indeed a most painfully solemn occasion. But little over a short week ago our lamented companion and brother sat upon this bench and presided over this court. In the brief interval, he has passed from earth, and we have followed him to the silent tomb. The places which have known him will now know him no more forever. Truly, "in the midst of life we are in death."

Your tribute, commemorative of his eminent qualities as a man and jurist, will doubtless awaken a hearty response from the legal profession throughout the State. No man, no lawyer, no judge, ever merited it more justly. The law has not only lost one of its ornaments and the State a representative and patriotic citizen, but society has lost an invaluable member and Christianity one of her brightest exemplars. As a lawyer, he was passionately devoted to and illustrated a profession the most honorable amongst men; as a judge, his dearest object was to administer the law in its justice and incorruptibility; as a citizen, he was impulsively and scrupulously honest, upright, and kind in all the relations of life; as a Christian, he strove ever to "do justice, love mercy, and walk humbly before God." In his character were intimately mixed and blended all those genial traits and elements which go to make up that highest perfection of humanity, God's noblest work, an honest man.

We will leave to others the pleasing task of gathering together the incidents and antecedents of a life and character which will make his biography worthy a prominent place amongst those of the illustrious dead of Texas. To us he was more than the citizen and lawyer, whose whole life was characterized by adhesion to principle and faithfulness to duty; more than the noble soldier, who had not only risen to high rank in the profession of arms, but had cheerfully devoted a limb to the maintenance of "a cause" which, though "lost," is still glorious in the memories it

has left us. In addition to these high claims to honor, it is our peculiar pleasure to remember him as the presiding judge of the Court of Appeals. Here, for three long years and a half, by day and by night, in the consultation and in the court, we have been most intimately associated with him. How zealously and well he discharged his high trust in the administration of justice and law it ill becomes us, perhaps, to say; his work in this respect is before the world, that it may be seen and judged of by men. We will, however, say that if an ever-present consciousness of responsibility, an untiring desire and industry to solve the intricacies and adjudicate the law and facts of cases before him according to justice and the right, may bespeak for man's efforts the respect and commendation of his fellow-men, his work will be fully entitled to respect. He lived for it mainly; he died at his post, with his armor on, in the very midst of its accomplishment.

But to us he was more than a presiding officer: he was ever, indeed, "a guide, a counsellor, a friend." Noble in every instinct, generous to a fault, kind and sympathetic as a woman, "he was the ornament of human nature itself in the beautiful illustrations which his life constantly presented of its most attractive graces and most elevated attributes." His loss to us, the companions of his judicial labors, can never be wholly supplied.

But he has gone forever from our midst, and no more will this court be honored and gladdened with his presence. Yet his memory will live and be honored of men. We will still have to cherish and console us the recollection of his many virtues, the bright example he has left us, the memory of the pure, earnest, child-like Christian faith which actuated his daily walk and conversation, and which enabled him in the end to bear his bodily sufferings with patient fortitude and resignation, looking confidently forward to the enjoyment of that "rest which remaineth for the people of God." He was as earnest a Christian as he was earnest as a judge.

May his bright example never be forgotten. Endeavoring to follow it, may we each so live —

— "that when our summons comes to join
The innumerable caravan that moves
To that mysterious realm, where each shall take
His chamber in the silent halls of death,
We go, not like the quarry-slave at night,
Scourged to his dungeon; but, sustained and soothed
By an unfaltering trust, approach our grave
Like one who wraps the drapery of his couch
About him, and lies down to pleasant dreams."

It is ordered that the resolutions of the bar and those of the Commission of Appeals be entered upon the records of the court, as requested, and that the court do now adjourn.

As the telegraph and the press disseminated the news of Judge ECTOR's death, the public voice found expression in

innumerable tributes to his character and his services. From one of these, by Walter L. Wilson, Esq., of the Galveston bar, who knew him well, the following extracts are taken as representative of all: —

“Judge Ector disliked ostentation, and was averse to the arts and displays by which men often achieve reputation; but on those occasions (and they were not few in his professional and political career) when his powers were called into action, he evinced signal vigor and ability. In his habits and feelings he was the most unassuming of men. There was nothing artificial in his conduct, manners, or opinions; all was easy, quiet, and natural. He seldom was excited, and scarcely ever angry, but kept his emotions within easy control. His instinct was quick and remarkably correct, and he was disposed to rely with a good deal of confidence upon the impression which the first view of a subject made upon his mind; but he was ready to correct the first impression if, on further examination, he found grounds for change. The turn of his mind was eminently practical, and he seldom indulged in generalization or philosophical speculation. Probably it was from military discipline he acquired his love of regularity and order.

“He entered the Confederate service as a private, was elected to the rank of colonel, and afterwards, for gallant and meritorious conduct, was promoted to the grade of brigadier-general, having lost a leg in the movement before Atlanta. He led his brigade with distinguished success until the close of hostilities in 1865, when the cause he had espoused and followed through the war became futile but historical. That cause had no more earnest or determined supporter than he; and one of the most pleasant memories of this is the steady faith and courage which he uniformly maintained even in the darkest days of the struggle, and his lofty adherence to principle to the end. Though naturally conservative, his sense of justice and of honor, and all the traditions of his ancestry, forbade him to compromise principle.

“After the war he resumed the practice of his profession, but was soon called into judicial service, being twice chosen for the important and responsible position of district judge, and assigned by law to the district comprising Harrison County. Distinguished for the fidelity and accuracy with which he discharged the arduous duties of that official trust, and for his sound and trustworthy judgment, he was unanimously nominated and elected to the high position of judge of the Court of Appeals, at the general election held under the ordinance of the Constitutional Convention of 1875. Upon the organization of that court, in May, 1876, he was chosen by his colleagues, Judges Winkler and White, to be the presiding judge of this, the tribunal of last resort in criminal causes. Here, as elsewhere, learning, dignity, purity, and courtesy eminently characterized his judicial action, to the exclusion of every influence of passion, prejudice, or partiality. He looked right over and beyond the parties and their counsel, yielded nothing to popular clamor or other intrusive adviser, and obeyed

no behest but that of the law. His integrity 'seemed rather to be constitutional than to come from any very nice conscientiousness;' he was honest because he could not be otherwise. Of high spirit, positive convictions, and ardent affections, these qualities were kept in subjection, in all affairs touching the public interest, by the discipline of a judgment which never wavered. His nature was kind and generous, incapable of malice or ill-will, and patient almost to a fault. Socially, his warm-hearted and genial temperament and his affectionate disposition endeared him to those who knew him well. It is scarcely possible that more implicit confidence or more perfect cordiality ever prevailed among men than that which existed between himself and his associates of the Court of Appeals. In the family circle he was all that conjugal love could ask, or filial affection hope for.

"Though no politician, he was positive and consistent in his political principles, and occupied a position of influence in the party with which he was connected, having received many expressions of its confidence. In all measures for the promotion of the moral and educational interests of the country his public spirit promptly enlisted his sympathies and coöperation. A Christian's profession and a Christian life, manifested openly but humbly before the world, completed the character of Judge ECTOR. By his death the Court of Appeals has lost an able and spotless jurist, the profession an eminent and most worthy member, his city an influential and valued citizen, and the State and people of Texas an active and earnest friend of all their best interests."

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COURT OF APPEALS OF TEXAS.

TYLER TERM, 1879.

DICK COX v. THE STATE.

1. **NEW TRIAL.** — Separation of a jury is not, even in a capital case, cause for new trial, unless it appears to be probable that the fairness of the verdict was affected thereby, or that injustice to the appellant resulted therefrom.
2. **SAME.** — Note in the opinion circumstances held insufficient to show such a separation of the jury in a capital case as entitled the prisoner to a new trial.
3. **PRACTICE.** — In trials involving life or liberty, especial care should be exercised by jurors and by the officers of court to prevent any violation of the rule of the Code prohibiting the separation of the jury.

APPEAL from the District Court of Walker. Tried below before the Hon. W. D. WOOD.

The indictment charged the appellant with the murder of P. W. Randolph, on February 8, 1878. On his first trial he was found guilty of murder in the first degree, and adjudged to be executed. From that judgment he appealed to this court, and the conviction was set aside. The report of the case will be found at p. 493, 5 Texas Ct. App., where a full statement of the facts of the homicide is given.

At the trial from which the present appeal is had he was convicted of murder in the second degree, and his punishment was assessed and adjudged at thirty-five years in the penitentiary. The only ground of complaint discussed by this court is the separation of the jury, and in the opinion will be found a clear statement of the facts relevant thereto.

For the benefit of clerks of the courts below, it may be well to note that a second transcript of this case was re-

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quired, because the clerk's final certificate to the first one was not authenticated by the seal of his court.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The appellant was convicted of murder in the second degree, and his punishment assessed at thirty-five years in the penitentiary. He has appealed from this conviction, and seeks to reverse the judgment on the grounds stated in his assignments of error, which are as follows, to wit: —

“ 1. The court erred in not granting defendant a new trial, because the facts adduced upon the trial do not support the verdict of the jury.

“ 2. The separation of the jury after they had heard the charge of the court and had retired to consider of their verdict vitiated the verdict of the jury, and a new trial should have been granted upon that ground alone, if upon no other.”

This is the second appeal that has been prosecuted in this case. On the first trial the appellant was convicted of murder in the first degree, and the judgment of the District Court was reversed because this court held the proof not sufficient to sustain a conviction of murder in the first degree. See the case, reported in 5 Texas Ct. App. 493.

There is some conflict in the testimony. We believe, after a careful examination of all the evidence in the case, that the jury were warranted in finding the appellant guilty of murder in the second degree. The charge of the court presented a correct, clear, and able exposition of the law applicable to the case, and we see nothing in it calculated to work prejudice or injury to appellant. So far as the record shows, both parties appear to have been satisfied with it.

One of the grounds in appellant's motion for new trial, and

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which is made his second assignment of error, is that the jury, after they had received the charge of the court and had retired to consider of their verdict, did not keep together until they had returned into court their verdict, but separated during the trial, and when so separated some of them conversed with other parties than those of their own body. And in support of this ground of the motion appellant presented to the court the affidavit of a witness, who testified to the following facts, to wit: That the jury who tried the case, after they had received the charge of the court and retired to consider of their verdict, were escorted in a body to the Gibbs Hotel, in Huntsville, to get their dinner; and while they were at the table eating their dinner, other persons than the jurors and the officers having them in charge were also eating at the same table; that after some of the jurors had eaten, and before others had finished, some of those who had finished went out into a hall, out of sight of those remaining in the dining-room; and after all of said jurors had eaten, and retired from the dining-room, some of them went out upon the piazza of the hotel, and others of them went into a little house some thirty steps away from said piazza, and for a portion of the time were out of sight of the other jurors.

The district attorney submitted to the court, in opposition to the motion, the affidavits of six of the jurors who tried the case. They state in their affidavits that, while the jury was at the Gibbs Hotel, they did not converse among themselves about said case, nor did any person say any thing about it to them or in their hearing; that while they were at the hotel three members of the jury went into a small house close by, and while there conversed with no one except themselves; that while they were deliberating on their verdict they neither saw nor heard any thing that influenced their verdict; and that their verdict in this case was founded on the evidence and charge of the court, and nothing else.

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The district attorney also submitted the affidavit of the deputy-sheriff, who was the officer in charge of the jury, who testified that the facts stated in the said affidavits of the jurors were true, to the best of his knowledge and belief; that, when the jurors were at dinner at the hotel, some of the jurors went out of the dining-room at the hotel, and went into an adjoining room, but the door was open between the two rooms, and he could and did see them; that some of the jurors also went into a privy close by, and he went near the yard fence and watched them; they went into and came out of this small house one at a time.

The District Court overruled the motion for a new trial. After considering the evidence introduced by both parties, we believe there was no error in this ruling of the court.

Art. 605 of the Code of Criminal Procedure provides that after a jury has been sworn and empanelled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the district-attorney, and in charge of an officer. In cases involving life or liberty it is certainly a matter of the utmost importance that this rule should be strictly observed; and the jurors themselves and the officers of the court should be careful to guard against the slightest violation of it.

Our Supreme Court, in a number of cases, have held that something more than separation of the jury such as is forbidden by the Code is required to affect the fairness of a verdict; that it must affirmatively appear that there was some reason to suppose that wrong or injustice might have resulted from it to appellant. And the same rule has been followed by this court. *Jack v. The State*, 26 Texas, 1; *Johnson v. The State*, 27 Texas, 770; *Wakefield v. The State*, 41 Texas, 556; *Jenkins v. The State*, 41 Texas, 128; *Davis v. The State*, 3 Texas Ct. App. 91; *Gilleland v. The State*, 44 Texas, 356.

In the case last cited the court say: "Misconduct of a

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jury is not made an absolute ground of a new trial. * * * For this court to reverse a judgment on the ground that such a motion has been overruled, it must be made plainly to appear that appellant has probably suffered some injustice by the ruling on the motion.”

The record does not show the slightest reason to suppose that any wrong or injustice might have resulted to appellant from the separation of the jury, or that appellant thereby has not received a fair and impartial trial; and consequently the court was not authorized to grant a new trial on this ground. There is no other question presented in the record that we deem necessary to notice especially in this opinion. The trial was in all respects fair and regular. There is no error in the judgment, and it is therefore affirmed.

Affirmed.

LUM STREET v. THE STATE.

1. **MALICIOUS MISCHIEF.** — By art. 718 of the original Penal Code, the punishment for the wilful killing, etc., of certain animals, with intent to injure the owner, was by fine of not less than three nor more than ten times the amount of the injury done the owner. Under this article defendant was charged with the killing of twenty-five hogs, worth \$60, to the owner's injury \$60. *Held*, that the measure of the punishment being regulated by the injury to the owner, and not by the value of the animals, the State was not bound to prove the killing of the entire number of animals alleged in the information, but only of so many as warranted the jury in fixing the fine at the amount assessed in their verdict.
2. **SAME — PRACTICE — EVIDENCE.** — *Quære*, whether the right of election obtains in misdemeanors. But when a misdemeanor indictment contains but one count, and it covers a single transaction only, but the evidence tends to prove more than one transaction, the proper practice is for the defence to move the court to exclude all evidence except such as conduces to the proof of a single offence. If, however, as in the present case, the motive or intent of the defendant be a substantive element of the offence charged, evidence which tends to show such motive or intent is competent, notwithstanding it develops other offences.
3. **SAME.** — A conviction will not be set aside on account of an erroneous ruling on a mere question of practice, when it is apparent that the defendant was not prejudiced thereby.

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4. PRACTICE IN THIS COURT. — The charge of the court below is construed in its entirety, and not tested by the abstract accuracy of each clause.

APPEAL from the County Court of Henderson. Tried below before the Hon. W. L. FAULK, County Judge.

The material facts are disclosed in the opinion. The fine assessed against the appellant was \$30.

Robertson & Finley, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Appellant was convicted of malicious mischief on the second day of September, 1879, under art. 2344, Paschal's Digest. The information charged the offence to have been committed on the 10th of July, 1879, and, substantially, that it consisted in his having unlawfully, maliciously, and wilfully beat and killed twenty-five head of hogs, naming the owner, of the value of \$60, and to the injury of the owner \$60.

From the great number of questions raised, and the earnestness with which they have been insisted upon both here and in the lower court, it is evident that his counsel were determined to have every technical and substantial right fully adjudicated in the application of the rules of law to the trial of the case. We do not propose to notice at length all these questions, but to select out one or two of the most prominent; since, in our opinion, their solution will determine his right to a reversal of the judgment.

And first, as to whether the proof sustained the charge in the information. As stated above, the charge was the wounding and killing of twenty-five hogs, the aggregate value of which was alleged to be \$60; there being no separate value alleged to the individual hogs injured. On the trial, the evidence showed only ten hogs to have been killed, and they killed at different times.

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Now, under the statute (Pasc. Dig., art. 2344), the penalty for the offence is made to depend upon the amount of injury done to the owner, — this injury being in fact the very gist of the offence. As was said in *Thomas v. The State*, 42 Texas, 235, “the value of the property is not made the standard for measuring the penalty. As a question of law, it cannot be said that the value of the hogs was the amount of the injury done the owner.” The injury done the owner is the essential element in the punishment, and the basis for assessing it. *The State v. Heath*, 41 Texas, 426. And in *Nicholson v. The State*, 3 Texas Ct. App. 31, this court said: “It will be seen that in case of conviction the amount of the fine is to be regulated, not by the value of the animal killed, or the amount of injury done to the animal, but by the amount of injury done to the owner.”

In theft a different rule prevails. “Whenever the value of the property alleged to have been stolen is an element for determining the grade of the offence or the extent of its punishment, it is unquestionably necessary to allege in the indictment the value of the stolen property. Obviously, therefore, when the difference between grand and petit larceny is distinguishable merely by the value of the property stolen, not only must its value be stated, but, where several articles are stolen, unless the value of each article stolen is alleged, instead of the aggregate value of the whole, if there is a failure in the proof of the larceny of some of them, a general verdict would not be justified by the evidence or warrant a judgment, because in such case the indictment would not show the value of the articles proved to have been stolen, or the grade of the offence of which the defendant should be adjudged guilty. It is therefore generally customary, and is certainly more prudent, to allege the separate value of the articles stolen, rather than to charge merely their aggregate value.” *Thompson v. The State*, 43 Texas, 268; *Ware v. The State*, 2 Texas Ct.

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App. 547; *Meyer v. The State*, 4 Texas Ct. App. 121; *Doyle v. The State*, 4 Texas Ct. App. 153.

Injury done the owner is alleged to be \$60 in the information we are considering, and we apprehend that it was only necessary, in order to make out the case, to prove the killing of one or more of the hogs, and the amount of the intended injury occasioned the owner thereby, to have enabled the jury intelligibly and legally to assess the punishment under the statute. This disposes of defendant's first bill of exceptions.

In his second bill of exceptions and third assignment of errors, the point of objection is that the court erred in its refusal to compel the prosecution, after all the evidence in the case had been adduced, to elect on which killing shown by the evidence the cause would be submitted to the jury,—the evidence having shown the killing to have been done on different days. For rules with regard to the practice of election in felony cases, and especially where the indictment contains more than one count setting forth distinct offences, see *Dalton v. The State*, 4 Texas Ct. App. 333, and authorities, and amongst them *Lunn v. The State*, 44 Texas, 85, relied upon by appellant.

The case at bar is a misdemeanor, and contains but one count. Whether the right of election obtains at all in misdemeanors, and especially in cases where there is but a single count setting out the offence, has been much discussed with a diversity of opinion in the courts. See *Waddell v. The State*, 1 Texas Ct. App. 720, and authorities cited; Bishop's Cr. Proc. (2d ed.), sect. 458, and note 2; *id.*, sect. 461.

We do not deem it necessary to lay down any general rule on the subject in this case. In our opinion, the better practice in such cases as the one at bar, where the indictment is for a misdemeanor, containing but a single count and purporting to cover but a single transaction, should the evidence after its introduction develop more than one

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transaction, — we say the better practice would be, and the simplest, to move the court to exclude all evidence but such as goes to sustain a single transaction. This certainly would subserve the purposes sought, which in every criminal case should be to limit the investigation to but one offence.

The motion in this case was a motion of this character, and could well and should have been treated by the court as such. But, inasmuch as the case was one where the motive or intent with which the act was committed was the gist of the offence, it was permissible to go into and show other criminal transactions of a similar character, as evidence of the intent or motive; and to this extent the evidence was doubtless admissible. *Gilbraith v. The State*, 41 Texas, 567.

Under the circumstances, the proper practice would have been for the court to grant the motion, and to have excluded the evidence establishing more than one transaction so far as estimating the punishment was concerned, but allowing the jury still to weigh and consider it in determining the motive or intent with which the single act was done.

The court having erred in its ruling, should the case be reversed for the error? We think not, because it appears that no injury was occasioned the defendant by the error. Under the statute in force at the time when the offence was committed (Pasc. Dig., art. 2344), the punishment affixed to the offence was not less than three times nor exceeding ten times the amount of the injury done the owner. The verdict and judgment assess the punishment at a fine of \$30. If but a single hog was killed, worth \$3, and there is evidence to that effect, then the verdict was within the limits of the law and was not excessive; and defendant could not be heard to complain, it not being made to appear that he was injured. In other words, the error does not appear to have been a material one. *Haynes v. The State*, 2 Texas Ct. App. 84; *Taylor v. The State*, 3 Texas Ct. App. 387.

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Abstractly considered, that portion of the charge of the court to the jury, viz., that "the intent to injure cannot be proved by positive testimony," may have been erroneous; but the error, if such, was cured and corrected by a proper charge, which was given, and which followed immediately and in close connection with the objectionable portion, and which is in these words: "It is for you to determine, from all the facts and circumstances developed by the testimony, whether there was or was not an intent on the part of defendant to injure the owner." *Browning v. The State*, 1 Texas Ct. App. 96; *Boothe v. The State*, 4 Texas Ct. App. 202. And this was followed by an appropriate charge on the presumption of innocence and the reasonable doubt.

The general charge of the court was full and sufficient in its presentation of the law of the case; and we perceive no error in the refusal to give the two special instructions asked for by the defendant,—the first not being correct as a proposition of law, and the second having in substance been already embraced in the charge given.

On a review of the whole record, we see no such material error as would require a reversal of the judgment, and it is therefore affirmed.

Affirmed.

GEORGE GRAY v. THE STATE.

UNLAWFUL PURCHASE OF PUBLIC LAND. — Indictment, based on art. 1868, Paschal's Digest, charged that the accused was county surveyor of Stephens County, and that he did on a certain day, and in said county, "deal in land-certificates of the State of Texas, and was then and there interested and concerned in the purchase and sale of an interest in the public lands of the State of Texas, contrary to law," etc. *Held*, that the indictment is bad for uncertainty, and because the said art. 1868 does not designate county surveyors among the officials prohibited from dealing in the public lands. Note, however, that the Revised Code corrects the omission.

Opinion of the court.

APPEAL from the District Court of Stephens. Tried below before the Hon. J. R. FLEMING.

The opinion states the case.

W. J. Brocket and *T. B. Wheeler*, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was convicted of a supposed violation of art. 244 of the Penal Code (Pasc. Dig., art. 1863), which is as follows: "If any person who is an officer or clerk in the general land-office, or a district surveyor or deputy district-surveyor, shall directly or indirectly be concerned in the purchase of any right, title, or interest in any public land in his own name, or in the name of any other person, or shall take or receive any fee or emolument for negotiating or transacting any business connected with the duties of his office, other than the fees allowed by law, he shall be removed from office and fined in any sum not exceeding five hundred dollars, and be excluded from holding any other office under the State."

The charging portion of the indictment upon which the appellant was tried and convicted is as follows: "That heretofore, on, to wit, the fifteenth day of January, A. D. 1877, in the county of Stephens and State of Texas, George Gray was the county surveyor of Stephens County, State of Texas, duly elected and commissioned, and the said George Gray, then and there county surveyor as aforesaid, did then and there deal in land-certificates of the State of Texas, and was then and there interested and concerned in the purchase and sale of an interest in the public lands of the State of Texas."

A motion was made to quash the indictment on the following grounds: *First*, for the reason that the same does not allege any offence known to the laws of the State of Texas; and, *second*, the indictment is uncertain in its lan-

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guage, and the offence is not charged in the language of the statute, nor in any language equivalent thereto.

The penalties of the article in question are imposed upon a certain class of officials and clerks, who are named therein, to wit, any person who is an officer or clerk in the general land-office, and a district surveyor or deputy district-surveyor. County surveyors are not mentioned. This omission has been supplied by the revised enactments of the last session of the Legislature, and in the reënacted article (art. 116) county surveyors and their deputies are added to the persons named in the original article; but the article as above set out was the law in force when the proceedings under consideration were had.

Two things are dencunced in the article cited, to wit, to be concerned in the purchase of any right, title, or interest in any public land, either directly or indirectly, either in his own name or in the name of any other person, and the receiving of any fee or emolument other than the fees provided by law for negotiating or transacting business connected with the duties of his office. There is no question of duplicity raised by the record, and there can be no pretence that the indictment attempts to charge the taking and receiving higher fees and emoluments than are prescribed by law for the duties to be performed or the services to be rendered.

If the indictment is sufficient, then it must be on the ground that the expression in the indictment, "did then and there deal in land-certificates of the State of Texas, and was then and there interested and concerned in the purchase and sale of an interest in the public lands of the State of Texas," describes the offence set out in the statute; which we are of the opinion it does not do. And even if this were the case, and whilst it is generally sufficient in offences created by statute to set out the offence in the language of the statute which creates the offence, yet it will not be so contended when the language of the statute alone

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is deficient in setting out the offence, and something more becomes necessary to be averred in order to complete the description of the offence and apprise the accused as to what particular violation of law he will have to meet on the trial.

By the Code of Procedure in force when this indictment was presented, as well as by that now in force, it was and still is required that in indictments the offence must be set forth in plain and intelligible language. In *The State v. West*, 10 Texas, 555, Judge Wheeler, after stating the rule which generally applies to statutory offences, says: "There is an exception to this rule when the statute uses generic terms, in which case it is necessary to state the species, according to the truth of the case; and when the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it." This court, in *White v. The State*, 3 Texas Ct. App. 605, quoting from a number of authorities, held that, as a general rule, it is sufficiently certain to describe an offence in an indictment in the language of the act creating the offence; but there are cases where more particularity is required, either from the obvious intention of the Legislature or from the application of known principles of law." And "certainty is as to the matter to be charged and the manner of charging it; the things necessary to the description of the crime must be stated. As to the matter charged, whatever circumstances are necessary to constitute the crime imputed must be set out. It is otherwise when the crime alleged is such independently of the circumstances; for then they may aggravate, but cannot constitute, the offence. As to the manner of making the averments, in all cases those which are descriptive of the crime must be introduced upon the record by averments, in opposition to argument or inference."

Syllabus.

If the acts complained of in the indictment in the present case describe the offence mentioned in the statute, it is not by averment, but inference. The indictment does not set forth the act or thing done by the defendant, and inhibited by the statute, in such plain and intelligible language as to apprise the accused what it is he is called upon to defend against, or to enable him to plead the judgment in bar of another prosecution for the same offence ; and it is against an officer not mentioned in the statute.

On these grounds, we are of opinion the indictment is insufficient to support the verdict and judgment, and think the court erred in overruling the motion to quash. The judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

GEORGE MOORE v. THE STATE.

1. **EVIDENCE — PRACTICE.** — Premature admission of evidence is not error when its competency is shown by that which was subsequently adduced, — as, for instance, the admission of incriminating declarations of an accomplice before the complicity was shown.
2. **SAME.** — Over the defendant's objection, the court below admitted certain testimony, but afterwards ruled it out and instructed the jury to disregard it. *Held*, that the error, if any, was corrected in the court below, and avails nothing here.
3. **SAME — ASSAULT WITH INTENT TO MURDER.** — Inasmuch as an indictment for assault with intent to murder includes the minor offences known as aggravated and simple assaults, evidence of these latter offences is admissible in a trial for the former.
4. **PRESUMPTION OF REGULARITY.** — Defendant offered a witness to whom the State objected because, as alleged in the bill of exceptions, the State's attorney "claimed that the proposed witness was indicted for the same offence in a different indictment, and was a principal in the commission of the offence." The objection was sustained and the witness excluded, but, aside from the objection itself, the record nowhere discloses the showing on which the ruling was based. *Held*, that the presumption of regularity obtains, and no error is apparent.
5. **PRACTICE.** — The Code of Procedure authorizes the introduction of testimony "at any time before the argument of a cause is concluded, if it appears

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that it is necessary to the due administration of justice." *Held*, that this invests the courts below with a discretion which will not be revised on appeal, unless shown to have been abused to the prejudice of the appellant.

6. **SAME.** — Defendant desired to recall his own witness for the purpose of having him repeat to the jury a statement made by him on his prior examination. The witness having disappeared, defendant was awarded an attachment for him, and the trial was adjourned until the ensuing morning, when, the witness not being forthcoming, the court required the trial to proceed, notwithstanding defendant's objection urged on the score of surprise. *Held*, that no prejudice to the defendant appears, nor any error in the ruling of the court.
7. **VERDICT.** — A verdict is good which, convicting the defendant of a felony, assesses his punishment at "hard labor in the State prison" for a definite and lawful number of years, inasmuch as the penitentiary is the only State prison known to the law, and hard labor a statutory concomitant to confinement therein.

APPEAL from the District Court of Van Zandt. Tried below before the Hon. J C. ROBERTSON.

The indictment charged George Moore, the appellant, with an assault on B. H. Pigues, with intent to murder him, and alleged that the assault was made with a loaded gun, on the 1st of November, 1878.

The encounter occurred in the storehouse of W. W. Kinlock, in the village of Grand Saline, Van Zandt County, and appeared to have grown out of animosity between Pigues and N. B. Moore, the father of the appellant, who is a youth of sixteen or seventeen.

Kinlock, the principal witness for the State, testified that about dark in the evening of November 1, 1878, the appellant and his father came into witness's store, and N. B. Moore remarked that Pigues had been running over him, and he was not going to stand it much longer. In a few moments, Pigues came in, and, addressing N. B. Moore, said: "Nub, what parties have told you is a G—d d—n lie, and I have nothing against you; but I am the best G—d d—n man in Grand Saline, and am not afraid of you." Pigues put his hand on his pistol, and N. B. Moore ran his hand in his pocket, and said, "Let us let all that drop just where

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it is." Just then the defendant, George Moore, who had been standing in the rear of Pignes, raised and presented at him a gun, the hammer of the right-hand barrel of which was cocked. This gun was loaded with duck-shot, and had been left at the store by a young man two or three weeks before. It stood against the wall, near where the defendant was standing. Observing the defendant present the gun, witness spoke to Pignes and said, "Look behind you!" Pignes turned and sprang at the defendant, seized the gun, and both went out of the door, scuffling over it. N. B. Moore followed them immediately; and about the time he got out, witness heard three or four reports of firearms. In a few moments the witness also went out, and saw Pignes lying on his face, apparently dead. Obtaining assistance, witness carried him about a hundred yards to a house, and remained with him about half an hour, when he became conscious. Witness saw a small, round hole just under Pignes's left eyebrow. Leaving Pignes, the witness returned to his store, when N. B. Moore came in and showed witness Pignes's pistol, of which three barrels were empty, and seemed to have been recently discharged.

This witness further testified that when the difficulty commenced the only persons in the store were himself, Pignes, and the two Moores; N. B. Moore was in his shirt-sleeves, and exhibited no pistol; that the gun was discharged immediately after Pignes and the defendant got out of the door, and the load took effect in the wall. After the affray, the gun was found with the muzzle full of dirt, and the lock and hammer of the right-hand barrel broken.

B. F. Pignes, testifying for the State, gave substantially the same account as Kinlock of so much of the affray as transpired in the store. As he and defendant went out of the door, he noticed N. B. Moore advance; and as the latter got out, he fired on witness with a pistol; and then the gun went off, and N. B. Moore fired at witness again; and then, after a profane exclamation, fired a third shot at witness,

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which struck him under the left eyebrow, and he remembered nothing more until he found himself at his home. The injury confined him to his bed for three or four weeks, and had destroyed the sight of his left eye.

This witness stated that he did not fire a shot during the affair, nor attempt to do so. Three chambers of his pistol were empty when it commenced; he had discharged them at a hawk, about the middle of the day. He admitted that he was somewhat under the influence of whiskey at the time of the *rencontre*, but stated that he knew what he was doing. He and the two Moores had spent part of the day in a ten-pin alley, rolling for blackberry brandy.

The defence introduced Jack Bell, who stated that he was in Kinlock's store, and witnessed the beginning of the difficulty between Pignes and the two Moores. According to his testimony, the defendant did not present the gun at Pignes, nor attempt to raise it to a shooting position, but had it in his right hand, with the muzzle towards the floor, when Pignes turned upon him. This witness also had been indulging in blackberry brandy during the day. He stated that he did not know the nature of an oath, and could not say what would be done with him if he swore to a lie, but supposed he would go to the bad place.

The State recalled Kinlock and Pignes, and they testified that Jack Bell was not in the store when the difficulty began.

The defence proposed to recall Jack, but he was not to be found. An attachment for him was issued, and the court adjourned until the next morning; when the court required the trial to proceed, and the defence excepted on account of the absence of the witness, whom they needed for the purpose of having him repeat his statement that he was present in the store when the difficulty took place.

Under an able and ample charge from the court upon the law of assault with intent to murder, aggravated assault, and simple assault and battery, the jury found the defendant

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guilty of assault with intent to murder, and assessed his punishment at "hard labor in the State prison for two years." A new trial was asked and refused, and he appealed.

R. H. Allen, for the appellant, filed an able brief.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. This appeal is from a judgment of conviction of an assault with intent to murder, the punishment being fixed at two years' confinement in the State penitentiary. A number of causes of error are assigned as grounds of error upon which a reversal of the judgment of the District Court is asked here, and which we propose to consider, so far as necessary, in the order set out in the bill of exceptions taken at the trial, in connection with such other portions of the record as bear upon the various questions presented for consideration.

1. It is objected that the court erred in admitting certain testimony of the State's witness, Kinlock, to prove certain statements made by N. B. Moore prior to the difficulty, on the ground that it was not shown that the defendant was present when the statements offered to be proved were made, and that no conspiracy between the defendant and the person who made the statement was shown. Whether the statements were strictly admissible at the time the testimony was offered or not, there can be no room for doubt that the further testimony developed the fact that, in the matter of the difficulty with the person alleged to have been assaulted, the defendant and N. B. Moore were acting in concert and in pursuance of a common design to such an extent as to make them principals, and on this ground the court did not err in admitting the testimony. And so of the testimony of this same witness as to the condition of the assaulted party; he merely related the condition of the party after the difficulty.

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2. A witness named High was permitted to testify as to certain other statements made prior to the difficulty, over the objection of the defendant, in which statements something was said about the party injured in the difficulty coming to Grand Saline to run the town, and that N. B. Moore spoke of what he would do if he fooled with him. As to this testimony, it is stated in the record that the "court ruled it out, and instructed the jury not to consider it, but to discard it entirely from their minds." Under the circumstances, the presiding judge, if indeed he had erred in admitting the testimony in the first instance, corrected the error in a lawful manner; and the error, if any, being corrected, leaves no room for complaint, that we see.

3. The next complaint is that the State was permitted, over objection, to prove by the assulted party the effect of the wound upon him. The objection raised was to the effect that, the indictment being for assault with intent to murder with a gun, a deadly weapon, the State could not rely upon proof of serious bodily injury for a conviction. Unfortunately for the position, the indictment included lesser degrees than intent to murder, and under it competent evidence of an aggravated assault or a simple assault was admissible. There was nothing in this objection.

4. The question here is that the defendant offered to place N. B. Moore on the stand for the purpose of testifying in his behalf, which was objected to by the State, and the objection sustained, on the ground, as stated in the bill of exceptions, "because he (the State's attorney) claimed that the said N. B. Moore was indicted for the same offence in a different indictment," and that he was a principal in the commission of the offence. The circumstances surrounding this question are not well elucidated in the transcript; all on the subject is that stated in the bill of exceptions. Still, inasmuch as the venue is laid in the county where the trial was being had, it is fair to presume from what is stated that the grounds of objection were true, or

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they would have been disproved ; and as the proposed witness, if he was in fact indicted for the same offence, could only have been properly indicted in the same court, it is to be inferred that the facts were either proved or conceded, or that the court took judicial cognizance of them under the general rule laid down by Mr. Greenleaf (vol. 1, sect. 6): “ Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these and like cases, when the memory of the judge is at fault, he resorts to such documents for reference as may be at hand and he may deem worthy of confidence.” We are of opinion the witness, being indicted for the same offence, was not competent, on the ground that he was a principal offender, and that this had been developed by testimony already before the jury. “ Persons charged as principals, accomplices, or accessories, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another.” Original Penal Code, art. 230 ; Rev. Penal Code, 36, art. 731 ; Pasc. Dig., art. 1826 ; *Myers v. The State*, 3 Texas Ct. App. 8.

5. It is here complained that after the defendant had closed his testimony the prosecution was permitted to recall a witness, and in rebuttal to ask him to restate his testimony ; it being contended that a mere repetition of his former statements was not in *rebuttal* of any thing produced by the defendant. The matter is about this : The defendant had introduced a witness who had given testimony as to what had occurred in the house in which the difficulty commenced, and the State’s witness was recalled apparently for the purpose of proving that the defendant’s witness was not in the house, he having stated that he was in the house when the fuss began. Whether the testimony offered could be said to be strictly in rebuttal or not, the evidence was admissible as tending to discredit the defendant’s witness.

The Code of Procedure provides “ that the court shall allow testimony to be introduced at any time before the ar-

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gument of a cause is concluded, if it appear that it is necessary to the due administration of justice." Old Code, art. 581; Rev. Code, art. 661. It is evident that it is within the discretion of the court to determine when the due administration of justice requires the introduction of further testimony within the time prescribed. When such is the case, this court will not revise the action unless it be shown that the discretion confided to the jury below has been abused; which does not appear here.

6. Another grave matter, or rather another matter gravely complained of in the bill of exceptions, is this, as stated by counsel for appellant: "The defendant, after the State had closed her testimony in rebuttal, desired to reintroduce witness Jack Bell, to rebut some evidence drawn out by the State in the examination of the last witness; and when the said Jack Bell was called, it was found that he had left the court-room and could not be found." The defendant here seems to have asked the immediate issuance of an attachment for the missing witness. The attachment was ordered, and the court adjourned until the following morning, when, the witness not being forthcoming, the court ordered the trial to proceed, against the defendant's objection, "because he was taken by surprise at the absence of said witness, who had been duly subpoenaed and was in attendance upon the court, and whose evidence was material to this defendant. * * * The fact desired to be proved by said witness Bell was that he was in the house where the difficulty took place, at the time of the difficulty; which fact he had already testified to."

We are at a loss to determine how the rights of the defendant were prejudiced by this action, when the bill of exceptions shows, and the statement of facts confirms the fact to be, that the witness had already stated the fact the defendant wished to prove by him, unless it was to contradict the State's witness who had said he was not in the house, and thus have the last word. Having already had

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the benefit of the statement, he was not injured by the order to proceed; and especially as this same witness, on cross-examination, had said he did "not know the nature of an oath," nor what would be done with him if he was to "swear a lie, but supposed he would go to the bad place."

In the motion for a new trial, several complaints are made against the charge of the court; but after carefully considering the charge, we are of opinion the objections are not well taken, and that there is no necessity of considering them *seriatim*.

The defendant made a motion and an amended motion for a new trial, and also a motion in arrest of judgment, all of which were overruled; and besides these, made a motion to correct the judgment against him, which last-named motion is not supported by the record. The grounds of the motion in arrest of judgment are, "because the verdict of the jury is informal, vague, uncertain, and assesses an impossible punishment; and because no legal judgment can be rendered upon it. And the sixteenth ground in the motion for a new trial is, because the verdict of the jury is not responsive to the charge of the court, is vague, uncertain, and assesses an impossible punishment."

The law which was in force at the time of the trial (Code Cr. Proc., art. 626 (Pasc. Dig., art. 3091; Rev. Code Cr. Proc. 85, art. 712) requires that, "where the plea is 'not guilty,' they (the jury) must find that the defendant is 'guilty' or 'not guilty'; and in addition thereto they shall assess the punishment in all cases where the same is not basolutely fixed by law to some particular penalty." The verdict under consideration is in the following language: "We, the jury, find the defendant guilty of an assault with intent to murder, and assess his punishment at hard labor in the State prison for two years." (Signed by the foreman.)

The jury performed the first duty imposed upon them by the first part of the article cited, and determined the issue

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submitted to them, in that portion of the verdict which reads "We, the jury, find the defendant guilty of an assault with intent to murder." This was the first and most important duty imposed upon them. This was the offence charged in the indictment, and the highest degree of that offence known to the law; and thus far the verdict is not subject to criticism either as to form or substance. But the duty of the jury under the law did not end with determining the issue as to the guilt of the accused: they were required to go further, and in addition thereto assess the punishment to the extent not absolutely fixed by law to some particular penalty.

It is urged on the part of the appellee that in so far as the *place* of punishment is concerned, that is absolutely fixed by law, and that to that extent the juries have no concern; that their province extends no further than to fix the amount and duration of the punishment. If this, though novel, be the correct exposition of the law, then it would seem that the verdict is sufficient for the purposes of the trial. We confess that the question is not free from difficulty. From the limited time allowed us, and on investigation of the authorities furnished and those we have seen, we have found no adjudicated case which precisely meets the question, and we incline to the opinion that it has not before been presented for adjudication under the Texas Code. On examining the statute law of the State, we find that it is declared that "if any person shall assault another with intent to murder, he shall be punished by confinement in the penitentiary not less than two years nor more than seven years. If the assault be made with a bowie-knife or dagger [and by the Revised Code the words "or in disguise" are added], the punishment shall be doubled." Pasc. Dig. art. 2155; Rev. Code, art 500. And by another article it is provided that "whenever the penalty prescribed for an offence is imprisonment for a term of years in the penitentiary, imprisonment to hard labor is intended." Pasc. Dig.

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art. 1676 ; Rev. Penal Code, art. 72. From these it seems that for this offence the law has determined absolutely the place of confinement, and the nature of the employment as at hard labor. These being absolutely fixed by law, and the limit allowed by law to the jury, the duty devolved upon them to assess the punishment within the limit prescribed. Have they performed this duty by assessing, as in the verdict, " his punishment to hard labor in the State prison for two years " ? Does the place mentioned vitiate the verdict, or can it properly be treated as surplusage ?

If we eliminate as surplusage the words *in the State prison*, the verdict would then be : " We, the jury, find the defendant guilty of an assault with intent to murder, and assess his punishment to hard labor for two years." It would seem that this, besides determining the guilt, fixes the extent of the imprisonment and its character, but does not name the place of confinement. We are of the opinion, however, that the words *in the State prison* are equivalent to the words *State penitentiary*, that being the only State prison known to the law.

Our sympathies have been enlisted on behalf of this young man. We find him, in company of his father, in a bowling-alley, where at least some of the parties were rolling ten-pins for and drinking medicated blackberry-brandy, and which is the introduction of the parties by one of the witnesses, and we are impressed with the belief that he has probably fared badly more on account of the bad company he was in than from any innate vice of his own ; and it may be that, like one of old, the son's teeth were set on edge on account of the father having eaten sour grapes. Yet, after a careful investigation of the case, we find no such error or defect committed as would warrant an interference with the verdict and judgment. The judgment is affirmed.

Affirmed.

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JOHN BELL v. THE STATE.

1. **THEFT.** — The Code of this State provides that, “if the person accused of theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it was taken be wholly entitled to the possession at the time.” *Held*, applicable to a renter or cropper on shares, whose contract with his landlord did not entitle the latter to the exclusive possession of the crop, and who, without the landlord’s consent, took part of the crop before it was divided.
2. **CASE STATED.** — By contract between the appellant and one T., the former became a cropper on the latter’s land, and each was to be entitled to one half of the crop when gathered. The crop was bound to T. for any advances made by him to the appellant. Before the crop was gathered or divided, the appellant, in the absence of T., pulled and sold a bushel of the corn. *Held*, that the taking was not theft.

APPEAL from the County Court of Gregg. Tried below before the Hon. J. F. WITHERSPOON, County Judge.

The opinion states the case.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Appellant was tried and convicted under an information charging him with the theft of one bushel of corn, worth seventy cents, and his punishment was assessed at a fine of \$10, together with imprisonment in the county jail for one month.

The facts of the case are that an agreement was entered into between Bell, the appellant, and one Tankersley, by which Bell was to become a renter or cropper upon land owned by Tankersley, each party to have one-half of the produce raised, when it was gathered, and the crop to be bound for advances made by Tankersley to Bell. Before the corn crop was gathered, Bell went into the field and pulled a bushel of ears, and sold it for seventy-five cents.

On the trial, defendant’s counsel asked the court to

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instruct the jury "that if defendant Bell was tenant on Tankersley's land, and had made a crop upon said land, and before a settlement Bell went into the field and took a bushel of corn, he is not guilty of theft; and you will so find." This instruction was refused by the court.

Our statute governing the case reads: "If the person accused of theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it is taken be wholly entitled to the possession at the time." Pasc. Dig., art. 2389. Again, we have another statute which provides that "the taking must be wrongful, so that if the property came into the possession of the person accused of theft, by lawful means, the subsequent appropriation of it is not theft," etc. Pasc. Dig., art. 2384.

Under the facts as applied to the law quoted, it is plain that defendant's liability depends solely upon the question as to whether or not, at the time he took the corn, Tankersley was *wholly* entitled to the possession of it. If he was, then defendant was guilty of theft; if he was not, then defendant is not so guilty. The article of agreement for rent under which the parties were operating does not confer the right to such possession upon Tankersley. Nor is such possession, or the right to such possession, conferred by the act of 1874, giving a preference-lien to landlords upon crops for advances made to renters. See Rev. Stats., art. 3107.

It seems that in North Carolina they have a statute which not only gives the landlord a "lien," but declares that the "possession" shall be deemed to be in him. And in that State, where the lessee, after gathering a crop and putting it in the crib, converted a portion thereof to his own use by feeding it to his own stock without the consent of the landlord, it was held an indictable offence. *Varner v. Spencer et al.*, 72 N. C. 381.

In Illinois the law is, that where land is leased for a share

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of the crops raised, to be divided after gathering, the title to the whole will be that of the tenant until the division and delivery. *Sargent v. Courier*, 66 Ill. 245. And so in Arkansas: "the mere ownership of land confers no right to the possession and disposal of the crop raised on it by tenants." *Robinson v. Kruse*, 29 Ark. 575.

In the absence of any statute, or of any stipulation in the contract of rent, giving the right to the possession wholly or exclusively to the landlord, we are of opinion that the landlord and tenant occupy the relation to the crop and each other, under such a contract as the one in evidence, of tenants in common, or joint owners, and the rules applicable to such relationship must govern in determining their rights. *Swanner v. Swanner*, 50 Ala. 66; *Wentworth v. Portsmouth R. Co.*, 55 N. H. 540.

With regard to such relationship, the law seems to be well settled that, "if the property was the joint property of the parties, it is clear that one of the joint owners or tenants in common could not be guilty of larceny by taking it and disposing of the whole of it to his own use; and that such taking and disposing of it would be merely the subject of a civil remedy, unless he took it out of the hands of a bailee with whom it was left for safe custody, or the like, and the effect of such taking would be to charge the bailee. (2 Waterman's Arch. Pl. 268; 1 Hale's P. C. 513; *Rex v. Bramley*, 1 Russ. & R. 478; *Rex v. Wilkerson*, 1 Russ. & R. 470; *Spivey v. The State*, 26 Ala. 90; *Long v. The State*, 27 Ala. 32.)" *Kirksey v. Fike*, 29 Ala. 206.

Such being the law, we are of opinion that the court erred in refusing to give the special instruction asked by defendant's counsel; and for this error the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

J. KILLINGSWORTH v. THE STATE.

1. **RECOGNIZANCE.** — There being no offence specifically designated in the Code as “malicious mischief,” a recital in a recognizance that the defendant is accused of “malicious mischief” is not a compliance with the statutory requirement that “the offence of which the defendant is accused be distinctly named in the bond.” The omission, therefore, of such a designation of the offence is not a fatal defect in a recognizance otherwise sufficient.
2. **SAME — DUPLICITY.** — A recognizance which recites that the defendant is accused of two distinct offences is bad for duplicity.
3. **CASE STATED.** — Recognizance for an appeal recited that the defendant was accused of “the offence of wilfully and wantonly beating and bruising one gelding, with intent to injure the owner.” *Held*, that this recital is duplicitous because, omitting the word “wantonly,” it describes the offence defined in art. 2344, Paschal’s Digest; and, omitting the clause “with intent to injure the owner,” it describes the offence defined in the next ensuing article.

APPEAL from the County Court of Henderson. Tried below before the Hon. W. S. FAULK, County Judge.

Adams & Coyner, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Two grounds appear in the motion of the assistant attorney-general to dismiss this appeal for the want of a proper and sufficient recognizance.

With regard to the first, it would undoubtedly have been the better practice to have inserted in the recognizance the fact that the cognizor was charged with “malicious mischief.” But “malicious mischief” *per se* and *eo nomine* is not defined as a specific offence in our Penal Code, and simply to state the offence as “malicious mischief” would not be sufficient. *McLaren v. The State*, 3 Texas Ct. App. 680. To make the charge sufficient where it is named as “malicious mischief,” it must in addition be followed in the recognizance by a direct statement of the matters and things which would constitute the offence under some one

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of the several articles of the statute. When the offence is set forth, however, by a direct statement of the matters and things with which the defendant is charged, and they constitute any one of the statutory offences, then the statute which requires that the offence with which the defendant is charged shall be named in the recognizance is sufficiently complied with, though it be not in fact called by its distinctive name. *Turner v. The State*, 41 Texas, 549. If the recognizance in this case were otherwise good, we do not think it would be bad simply because it failed to name the offence charged in terms as "malicious mischief."

But we are of opinion that the second ground of the motion is well taken, and that the recognizance is duplicitous, and contains two distinct offences in the description of the charge as therein set forth

As stated in the recognizance, the offence is "wilfully and wantonly beating and bruising one gelding, with intent to injure the owner." If the word "wantonly" be stricken out of the charge in the recognizance, then the offence would be the one described in Paschal's Digest, art. 2344, where the mischief is the injury done the owner, and where the punishment is not less than three nor more than ten times the amount of such injury. On the other hand, if the words "with intent to injure the owner" be stricken out of the charge in the recognizance, then we have the offence defined in art. 2345, Paschal's Digest, where the malice and injury are directed towards the animal itself, and where the punishment is by fine not exceeding \$250. The charge, therefore, as set out in the recognizance, "is demonstrably obnoxious to the objection of duplicity."

Where a similar objection was raised to an indictment in the case of *The State v. Dorsett*, Wheeler, J., said: "If the indictment did not contain a complete description of two offences, the words applicable to that in respect to which the charge was incomplete might be stricken out as surplusage, on authority of the case cited on behalf of the

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State from *The People v. Lohman*, 2 Barb. 216. But the description of both offences is complete, and there is no escaping the conclusion that the indictment is bad for duplicity." 21 Texas, 656.

Because the recognizance is bad for duplicity, the motion of the assistant attorney-general is sustained, and the appeal is dismissed.

Appeal dismissed.

G. W. HAINES v. THE STATE.

1. **ELECTION LAW.** — The act of 1876, entitled "An act regulating elections," provides that "during the entire day of any election for municipal, county, district, or State officers," it shall be unlawful for any establishment where liquors are sold "to be open;" and, in a subsequent clause of the same section, declares violators "guilty of a misdemeanor, and subject to indictment." *Held*, that prosecutions under this provision may be instituted by information as well as by indictment, — the rule not being applicable which makes a prescribed mode of prosecution the exclusive one, if it is contained in the prohibitory clause of the act. The offence is a misdemeanor within the jurisdiction of the County Courts, and the Constitution and statutes provide that "prosecutions in the County Courts may be commenced by informations in writing."
2. **SAME.** — The phrase "during the entire day of any election," used in said act, means the natural day of twenty-four hours, commencing and terminating at midnight. It is not to be understood as denoting only the hours during which the polls are open.
3. **CASE STATED.** — Appellant kept a "saloon" as a licensed retailer of liquors, and in the same house kept sundry other commodities for sale, paying tax as a merchant. On an election-day, but after the polls were closed, he opened his establishment and invited a number of by-standers in to drink. He was prosecuted by information for having his saloon open on an election-day, and his conviction is sustained.

APPEAL from the County Court of Wood. Tried below before the Hon. W. J. JONES, County Judge.

The opinion states the case.

Banks & Wright, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. The twenty-first section of the act of 1876 (Gen. Laws 15th Leg. 310) provides that “during the entire day of any election in this State for municipal, county, district, or State officers, it shall be unlawful for any bar-room, saloon, or other place, house, or establishment where vinous, spirituous, or intoxicating liquors are sold, to be open; but the same shall be closed by any sheriff or constable of the county, or by any constable whose special appointment is provided for by this act, on the order of the judges of election; and it shall be unlawful for any person or persons, or firm, to sell, barter, or give away any vinous, spirituous, malt, or intoxicating liquors, within the limits of the county within which such election is being held, during the day thereof. And any person violating any provision of this section shall, for each offence, be guilty of a misdemeanor, and subject to indictment, and may be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each offence; *provided*, nothing herein contained shall prevent the sale of liquor at any drug-store, or establishment where drugs are sold for medical purposes, on the prescription of a practising physician, nor to the sale of liquor by regular wholesale merchants, to be shipped or sent out of the county; *and provided further*, that nothing herein contained shall prevent stores from being opened for the sale of other goods, wares, and merchandise.”

Sect. 12 of the same act provides that “all the elections in this State shall be held for one day only at each election, and the polls shall be open on that day from eight o’clock, A. M., to six o’clock, P. M.” Gen. Laws 15th Leg. 307.

Appellant was tried and convicted in the County Court under a prosecution instituted by information. Evidence adduced on the trial established the facts that on the day of the election, and after the voting was over and the polls were

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declared closed by the sheriff, the defendant threw open the doors of his bar-room or saloon, and invited the crowd to come in and drink, — that “it was his treat.” Some if not all of the crowd accepted his amiable hospitality, and partook of the free drinks so generously offered. Over the front of the house was a sign marked “saloon,” and in the establishment defendant kept a bar-room where spirituous and vinous liquors were sold by the drink. Other evidence tended to show that defendant kept for sale in his saloon “sardines, oysters, salmons, pickles, canned fruits, flour, vinegar, cigars, and other articles besides whiskey and brandy,” etc., for the privilege of selling which “defendant pays a tax as fourth-class merchant, besides a tax to retail liquors and tobacco.”

The motion in arrest of judgment presented the issue that defendant could not, as was attempted, be prosecuted for a violation of the law by information, because the statute in terms declared that for such offences the offender would “be guilty of a misdemeanor, *and subject to indictment;*” and that the statute, having prescribed the proceeding by indictment, excluded the right to proceed by information. In support of this proposition we are cited by counsel to *Phillips v. The State*, 19 Texas, 158, where it is declared that, “if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other.” We do not controvert the correctness of the rule as thus enunciated, but its applicability to this case. As seen from the statute (sect. 21) above quoted, the prohibition and the penalty are not in the same but in different clauses. A violation of the law is declared to be a misdemeanor; and, in construing it, if the legislative intent were doubtful, it must be taken in connection with other acts passed at the same session by the Legislature. In the “act to organize County Courts and define their powers and jurisdiction,” we find that County Courts are

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given exclusive original jurisdiction of all misdemeanors, except such as involve official misconduct, and those where the punishment is by fine only, and the highest fine does not exceed \$200. Acts 1876, p. 172, sect. 3.

Again, at p. 20, sect. 8, of the Acts of 1876, we find that “prosecutions in the County Courts may be commenced by information in writing,” etc. And this same provision is contained in sect. 17, art. 5, of the Constitution; and also, by necessary implication, in sect. 10, art. 1, of the Constitution.

We cannot think that the Legislature intended that this particular class of misdemeanors should be reached and punished by indictment only, and we can perceive no reason for their so doing; nor do we believe they have so declared. Consequently, we are of opinion that the court did not err in overruling the motion in arrest of judgment.

It is contended that the court erred in charging the jury that the words “entire day,” used in the statute (sect. 21, *supra*), meant “a civil or natural day,” — that is, from midnight to midnight; and it is insisted that the words “during the entire day of any election” mean nothing more than the period during which the election was in progress, — that is, from 8 A. M. to 6 P. M., as provided in sect. 12 of the act. We think the instruction was correct both in reason and law. Evidently the Legislature, by the use of the words “entire day,” meant more than from sunrise to sunset, or from 8 A. M. to 6 P. M.

Generally, in legal signification, the word “day” includes the time elapsing from one midnight to the succeeding one. 2 Bla. Comm. 141. And another general rule is that the law takes no cognizance of fractional parts of a day. *Speer v. The State*, 2 Texas Ct. App. 246, and authorities cited.

But it is said that defendant’s bar-room and saloon was also a storehouse, and that, under the last proviso of sect. 21, *supra*, he had the right to keep the same open for the

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sale of his other goods, wares, and merchandise. There might be some plausibility in the position if the evidence had left us in doubt as to his motives and purposes in opening the doors. This it does not do. His object was, not to sell those "other goods," but to "treat the crowd." The crowd, or those of it who responded, for aught that appears with promptness, to the invitation, were not misled as to his meaning. It is evident that the first State's witness, Quitman Anderson, who was one of the party invited, did not get "any oysters, sardines, pickles, fruits," etc.; for he expressly says, "I don't remember seeing any such things in his house; there was a crowd in the house, and as soon as I got a drink I came out."

The charge of the court, as given, presented the law, and the special instructions asked for defendant were properly refused.

We see no error requiring a reversal of the judgment, and it is therefore affirmed.

Affirmed.

J. STRICKLAND v. THE STATE.

1. AFFIDAVIT FOR AN INFORMATION stated in its caption the proper county and the State, and, without elsewhere stating the name of the county, alleged the venue of the offence by appropriate words of reference to the caption. *Held*, sufficient.
2. NOTE in the opinion an affidavit and an information which are held not amenable to the objection that they charge different offences.

APPEAL from the County Court of Camp. Tried below before the Hon. W. P. SKEEN, County Judge.

The opinion sufficiently states the case.

R. W. Hudson, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

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WINKLER, J. The grounds of the motion in arrest of judgment are, (1) that the affidavit upon which the information was founded does not show upon its face that the offence was committed in the county where the same was filed; (2) that the information does not conform to or charge the same offence charged in the affidavit.

The objection to the affidavit presents a question quite similar to one raised in *Smith v. The State*, 3 Texas Ct. App. 549. There is great similarity between the two affidavits. In each the name of the county is set out, and is not stated elsewhere. But in one respect they are entirely unlike. In Smith's case, the affidavit upon its face does not state that the offence was committed in the county, as required by the statute cited in the opinion, and because of this omission it was held to be insufficient as a basis for an information.

The affidavit in the present case sets out the county in the commencement, as in the case of *Smith v. The State*, and, in stating the offence, uses this language: "That one James Strickland, being a person of robust strength, late of said county and State, on the 21st day of December, A. D. 1878, did then and there unlawfully," etc. The affidavit commences, "The State of Texas, county of Camp." We are of opinion that the expressions "late of said county and State" and "then and there" necessarily relate back to the statement "The State of Texas, county of Camp," and to the date on which the offence is stated, there being nothing else preceding to which the same can refer; and that the expression "then and there," used in the affidavit in the present case, if it had been inserted in Smith's case, would have cured the precise defect therein. The affidavit, we are of opinion, does show upon its face that the offence was committed in the county of Camp, where it was filed; and therefore the objection is not well taken.

But it is insisted on the part of the appellant that there is a fatal variance between the offence set out in the affida-

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vit and that set out in the information, or, as stated in the motion in arrest of judgment, the information does not conform to or charge the same offence charged in the affidavit.

We quote from each such portions as are necessary to determine the question of variance. The language of the affidavit is: "That one James Strickland, being a person of robust strength, late of said county and State, on the 21st day of December, A. D. 1878, did then and there unlawfully, with force and arms, strike, beat, and bruise him, the said J. H. Biles, upon the body and face of him, the said Biles, then and thereby inflicting serious bodily injuries upon him, the said Biles; and he, the said James Strickland, did then and there inflict the injuries aforesaid with the premeditated design to injure him, the said Biles."

The offence set out in the information is as follows: "That, on the 21st day of December in the year of our Lord one thousand eight hundred and seventy-eight, in the county and State aforesaid, one James Strickland, a person of robust strength, late of said county and State, did then and there unlawfully, with force and arms, strike, beat, and bruise him, the said J. H. Biles, upon the body and face of him, the said Biles, he, the said Biles, then and there being an aged person, to wit, — years of age, then and thereby inflicting serious bodily injuries upon him, the said Biles; and he, the said James Strickland, did then and there inflict injuries aforesaid with the premeditated design to injure him, the said Biles; contrary," etc.

We fail to discover any material variance between the offence as stated in the affidavit and that set out in the information. They both charge the same offence, committed in the same county, on the same day, by the same and upon the same. There is in both instruments an attempt made to cover two grounds of aggravation, as defined in the Code, by which an assault or battery becomes aggravated (Rev. Penal Code, art. 486),—to wit, the fourth, "when com-

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mitted by a person of robust health or strength upon one who is aged or decrepit ;” the seventh, “when serious bodily injury is inflicted upon the person assaulted ;” and perhaps the ninth, “when committed with premeditated design, and by the use of means calculated to inflict serious bodily injury.” There is no question of duplicity raised in the present case, and on that subject no opinion is expressed ; but we are of opinion that both the affidavit and the information charge the same offence, so far as the objection raised applies.

We are of opinion the testimony was not sufficient, under the law as charged by the court, to warrant a conviction of aggravated assault, and that a new trial should have been granted.

We think it proper to notice what appears in the record to be anomalous. Whilst it appears that the term of the court at which the appellant was tried and convicted adjourned on February 8, 1879, there is in the transcript an affidavit purporting to have been made by the sheriff and one of the justices of the peace of the county, stating that they examined the minute-book of the court on the eleventh day of February, 1879, and “there was not a single judgment or order rendered at the February term of record on said book, and that the same was not approved by the county judge, for,” the affiants say, “there was no minutes for him to approve.” The rights of the appellant were not affected by this irregular mode of transacting the business of the court ; and we do not desire to do more than call attention to the subject and to art. 1175, Revised Statutes.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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K. A. WILSON v. THE STATE.

RECOGNIZANCE — The condition of a recognizance on an appeal must stipulate for the appearance of the defendant before the proper court, at the proper time, "to abide the judgment of the Court of Appeals." A recognizance is not sufficient which is conditioned for the defendant's appearance "to await the action of the Court of Appeals."

APPEAL from the County Court of Anderson. Tried below before the Hon. W. G. W. JOWERS, County Judge.

Appellant was tried and convicted of an aggravated assault upon a female; his punishment was assessed at a fine of \$100, and imprisonment in the county jail for one year.

J. W. Cartwright and *J. J. Word*, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

ECTOR, P. J. The motion of the assistant attorney-general to dismiss the appeal in this case must be granted. The recognizance is conditioned that K. A. Wilson, the appellant, "shall well and truly make his personal appearance before the Hon. County Court of Anderson County, in the State of Texas, to be holden at the court-house in the town of Palestine, on the first Monday in April, 1879, and appear from day to day thereof, and from term to term thereafter, and await the action of the Court of Appeals in cause No. 216, wherein the State of Texas is plaintiff and K. A. Wilson defendant, wherein the said K. A. Wilson stands charged with an aggravated assault and battery; and not depart until discharged by order of the court."

The condition of a recognizance, as prescribed by the statute in force when this one was given, is that the defendant (naming him) will appear before the proper court, at the proper time, and there remain, etc., "to abide the judgment of the Court of Appeals of the State of Texas." Pasc. Dig., arts. 6599, 6600.

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The recognizance does not require the appellant "to abide the judgment of the Court of Appeals," as prescribed by statute, but to "await the action of the Court of Appeals," etc. We believe it does not substantially conform to the requirements set out in the form provided by statute.

The appeal is dismissed for the want of a sufficient recognizance.

Appeal dismissed.

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 J. STEVENS v. THE STATE.

1. PRACTICE. — In the cross-examination of a witness, it is not allowable to interrogate him upon collateral and irrelevant matters merely for the purpose of contradicting him by other evidence and thereby discrediting his testimony in chief.
2. SAME. — The extent to which the feelings and motives of a witness may be probed, with a view to test their influence on his testimony, must in practice be confided to the sound discretion of the judge who presides at the trial.
3. CROSS-EXAMINATION of a witness, however, should not be so restricted by the court as to preclude full inquiry into his relation to the parties and the subject-matter, his interest, means of knowledge, and the like.

APPEAL from the District Court of Wilson. Tried below before the Hon. E. LEWIS.

The evidence is elaborate, and a detail of it is not necessary to the comprehension of the rulings in the opinion. The punishment assessed and adjudged was five years in the penitentiary.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was tried on an indictment

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charging him with the theft of *two mares*, the property of Elijah T. Harper.

The main grounds relied on in defence appear to be, *first*, that the defendant had purchased or traded for the mares in controversy; and, *secondly*, that the defendant had voluntarily returned the animals before prosecution commenced. On the first question there was a conflict in the testimony, and an effort was made to impeach the credibility of the defendant's witnesses who testified that he had traded other property for the mares alleged to have been stolen, and also to show that the witnesses called on behalf of the State to discredit the defendant's witnesses were prejudiced against the defendant and his witnesses. These matters were in the main submitted to the jury under appropriate instructions by the court, and the jury found the defendant guilty, and judgment was entered on the verdict.

The general charge of the court was a clear enunciation of the law applicable to the case as made by the pleadings and the testimony; and besides this a charge asked by the defendant's counsel, and couched in language certainly very favorable to the defendant, was given, with slight and unimportant modifications, to the jury.

The most important question arising in the case as presented by the record is as to whether all the latitude allowed by law was afforded the defendant in cross-examining the State's witnesses, and in interrogating witnesses introduced by himself, in order to weaken, or discredit, or throw suspicion upon the witnesses for the State who had been introduced for the purpose of impeaching the veracity of the defendant's witnesses as to his having purchased or traded for the animals alleged to have been stolen; the gist of the matter appearing to be to prove that the State's witnesses had some connection with a vigilance committee, and this committee were inimical to the practices of the defendant and his witnesses. As to the cross-examination of the witnesses for the prosecution, the rule as laid down by Mr.

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Greenleaf is that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it, and thereby to discredit his testimony. 1 Greenl. on Ev., sect. 449.

As to the extent parties may carry investigation into the feelings and motives of witnesses, as influencing their testimony, the latitude allowed must necessarily be confided to the sound discretion of the judge who presides at the trial, in view of the fact that the object of introducing witnesses is to ascertain the truth of the matter in issue.

Still we do not wish to be understood as holding that the cross-examination of a witness is to be so restricted as not to allow full inquiry as to the situation of the witness with respect to the parties and to the subject of the litigation; his interest, his motives, his inclinations and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used these means, his powers of discernment, memory, and description, and the like. 1 Greenl. on Ev., sect. 446.

In considering these questions as they are presented in the several bills of exception, and the explanations given by the judge for his ruling, we are of opinion that all the latitude permitted by law was allowed the defendant, and that he was not in those respects deprived of a full and fair investigation.

The testimony does not establish the position that the property was voluntarily returned before prosecution commenced, so as to reduce the offence from felony to a misdemeanor. The court did not abuse its discretion in permitting witnesses to testify who were called solely for the purpose of impeaching a witness who had testified, though not placed under the rule.

We fail to find such error as would warrant a reversal of the judgment.

Affirmed.

 Opinion of the court.

E. S. MOORE v. THE STATE.

1. **STATEMENT OF FACTS.** — By the Revised Code and Revised Statutes the courts are empowered, by order entered of record in term-time, to authorize a statement of facts to be made up, signed, and filed within ten days after the adjournment of the term. In computing the ten days, the day of the adjournment is to be excluded.
2. **PRACTICE IN THE COURT OF APPEALS.** — In misdemeanor cases this court will not, as a general rule, consider unassigned errors. This rule, however, does not apply to questions of jurisdiction, nor to matters which necessarily reach the foundation of the prosecution, — as, for instance, a fatal defect in the substance of an indictment.
3. **INDICTMENT.** — If an indictment fails to allege, in plain and intelligible language, that the defendant “did” the acts constituting the offence, it is fatally defective in substance.

APPEAL from the County Court of Wood. Tried below before the Hon. W. J. JONES, County Judge.

The indictment was for having a bar-room open on an election-day. The word “did” was not inserted in the charging clause, where it was necessary to the sense of the accusation, and to its imputation to the defendant.

L. Z. Wright, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The law formerly required a statement of facts to be prepared during the term of court at which a trial was had; and the practice has been to disregard any thing purporting to be such, unless the transcript showed that it was prepared in term-time; and the fact appearing in the record that the statement of facts was prepared under an order of court in vacation, we take occasion to call attention to the law as it now is, on the subject.

By art. 784 of the Code of Criminal Procedure it is provided: “If a new trial be refused, a statement of facts may be drawn up and certified, and placed in the record, as in

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civil suits. When the defendant has failed to move for a new trial, he is nevertheless entitled, if he appeals, to have a statement of the facts certified and sent up with the record." The law on the subject of preparing a statement of facts in civil suits is found in arts. 1377, 1378, and 1379 of the Revised Statutes. Art. 1379 is as follows: "The court may, by an order entered upon the record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding ten days after the adjournment of the term."

Now, whilst it appears that, when the trial of this case was had, the term commenced on September 1, 1879, and adjourned on the sixth day of the same month, and that the statement of facts was not prepared and filed until the sixteenth day of the month, yet we find in the record, in connection with the notice of appeal, the following: "And it is ordered by the court that the statement of facts in this cause may be made up and signed and filed in vacation, within ten days after the adjournment of the term." So that the statement of facts appears to have been prepared and filed, in the terms of the article above set out, within "ten days after the adjournment of the term," exclusive of the day of adjournment, and allowing the defendant the full benefit of ten days thereafter, — the law as above set out being in force at the time of the trial.

Other questions are raised by the record, the most important of which arose and were decided in *Haines v. The State*, decided at the present term. There is, however, a substantial defect in the indictment, and one which goes to the foundation of the prosecution. The indictment does not, in plain and intelligible language, charge that the defendant *did* the things which constitute the offence. *Ewing v. The State*, 1 Texas Ct. App. 362, and authorities there cited. As a general rule, in misdemeanors this court will not consider errors not assigned. *Booker v. The State*, 3 Texas Ct. App. 227. This rule, however, does not apply

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to a question of jurisdiction, or to matters that necessarily go to the foundation of the prosecution, such as, in the present case, a substantial defect in an indictment; and for which the judgment must be reversed and the prosecution dismissed.

Reversed and dismissed.

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W. HUTTO v. THE STATE.

1. **INDICTMENT.** — In the second count of an indictment the name of the month was written "Janury." In the first count (which was dismissed) it was correctly spelled. *Held*, that a motion in arrest of judgment, based on the misspelling, was correctly overruled. Bad spelling does not vitiate, and the word is *idem sonans* with January; and, moreover, the first count had it correct.
2. **SAME.** — In an indictment for the theft of property of one Pettis, his name was in one place written "Pittis," if the dot over the second letter was the controlling sign; otherwise the letter appears to be "e," and the name correctly spelled. *Held*, not sufficient cause in arrest of judgment.
3. **VERDICT.** — The charge to the jury may be looked to for the purpose of ascertaining the offence of which the verdict convicts the accused.
4. **THEFT OF CATTLE.** — If the brand on a stolen animal be the only evidence of ownership relied on by the State, then it is necessary for the State to prove the record of the brand. But, irrespective of any brand, the ownership and identification of the animal may be shown by the flesh-marks, or other satisfactory evidence.
5. **CHARGE OF THE COURT.** — It is always advisable to give in charge to the jury the presumption of innocence as well as the doctrine of reasonable doubt, and a refusal to give it is error. The mere omission of the presumption, however, when not asked, is not ground for reversal.
6. **SAME.** — The charge need not submit a minor degree of the offence alleged in the indictment, unless there is evidence requiring it.
7. **NEW TRIAL.** — To entitle a defendant to a new trial on account of newly discovered evidence, he must bring himself within the established rules which control the subject. It is well settled that if the new evidence be merely cumulative of that adduced at the trial, it furnishes no ground for a new trial.

APPEAL from the District Court of Burnet. Tried below before the Hon. W. A. BLACKBURN.

Opinion of the court.

The material facts are disclosed in the opinion of the court.

Makemson & Fisher, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Two counts are contained in the indictment in this case. One is for wilfully taking into possession and driving cattle from their accustomed range, without the consent of, and with intent to defraud, the owner, it being framed under art. 2410*b*, Paschal's Digest; and the other an ordinary count, simply charging the theft of the cattle.

On the trial, the district attorney dismissed or *nolle prossed* the first count, and the defendant was only held to answer to the second, for theft. The court, in its charge to the jury, only submitted the law applicable to theft, and no special or additional instructions to the charge were asked for defendant. The verdict returned was: "We, the jury, find the defendant guilty of theft, and assess his punishment at three years' imprisonment in the State penitentiary." Judgment was rendered that the defendant was guilty "of theft of cattle."

A number of supposed errors are complained of. We will first notice those urged in the motion to arrest the judgment. Two of the grounds therein set out go to the sufficiency and certainty of the second count in the indictment, — it being the one selected, and under which the case was tried: *First*, that the time alleged is uncertain, in that the month in which the crime is said to have been committed is written "*Janury*," instead of "*January*," — there being no such month as "*Janury*" known to our calendar. *Witten v. The State*, 4 Texas Ct. App. 70, is in point on this question. There it was said: "It has been held time and again that bad spelling will not vitiate an indictment, and we can perceive no good reason why bad

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or awkward writing should." And in that case an indictment was sustained where it was questioned as to whether the month "February" was spelled with a "T" or an "F." In *Haney v. The State*, 2 Texas Ct. App. 504, cited and relied on by counsel, it was held that "*burger-ally*" was not *idem sonans* with "burglary;" that it was unintelligible, and that the verdict was therefore bad. On the other hand, we think "Janury" is *idem sonans* with "January;" and if not so, that it is certainly intelligible, and no one could well have been misled by it. In the first count, which was dismissed, the name of the month was written "January." In *Wills v. The State*, 8 Mo. 52, it was held that "where a *nolle prosequi* was entered to the first of the two counts of an indictment, and the time of committing the offence was only shown by reference to the first count, the defendant might be tried and convicted on the second count."

Secondly, it is claimed that the second count is uncertain, in this: that it alleges the taking of the property from and out of the possession of *William Pittis*, and alleges the property to belong to William Pettis. In copying the name Pettis, the clerk has evidently endeavored to give us, as near as possible, an exact representation of the appearance of the letter "e," or "i," as it looks written in the indictment; and but for the fact that the letter has a dot over it, it would undoubtedly be taken for and called "e," and, in our judgment, was written for and intended as an "e." We are thus asked to reverse the case simply on account of a dot over a letter, which may have gotten there by accident entirely. This we cannot do, and especially in a case where the two names, if spelled either with an "e" or an "i," would be so nearly *idem sonans* that we cannot say they do not come entirely within the rule.

A remaining ground urged in the motion in arrest is that the verdict of the jury (*supra*) does not find the defendant guilty of "theft of cattle," but guilty of "theft" only.

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The position is not well taken; the verdict is not only certain, but in every respect responsive to the issue before the jury. Were there any doubt in the premises, this case would come within the rule announced in *Marshall v. The State*, 4 Texas Ct. App. 549, viz., that "the charge to the jury may be looked to for the purpose of ascertaining the offence of which their verdict in such a case convicts the accused." (Citing *Chester v. The State*, 1 Texas Ct. App. 702, and *Patterson v. Allen*, 50 Texas, 23.) See also *Nettles v. The State*, 5 Texas Ct. App. 386.

Defendant's first bill of exceptions was reserved to the action of the court in permitting the district attorney to ask "the witness William Pettis if the cattle he found were his cattle," to which defendant objected because the proper mode of proving the ownership was by the records of marks and brands; which objection the court overruled, and permitted the State to prove the mark and brand of said witness for the purpose of identifying the cattle. We see no error. As was said in *Fisher v. The State*, 4 Texas Ct. App. 181, "the rule is this: Where the prosecution relies entirely upon the brand upon the stolen animal as evidence of ownership as against the accused, then the State must show a recorded brand. *Poage v. The State*, 40 Texas, 151; Pasc. Dig., art. 4659; *Allen v. The State*, 42 Texas, 517. But this is the rule only where the brand is solely relied upon as evidence of ownership. Where the animal can be proven and identified by flesh-marks, or other evidence of title or ownership, independent of the brand, it was never intended that the prosecution must fail for want of a recorded brand also. 'For an unrecorded brand is admissible to aid in proving the identity of a stolen animal, the title being established by other testimony.' *Poage v. The State*, 43 Texas, 454; *Johnson v. The State*, 1 Texas Ct. App. 333." Besides the proof of the marks and brands as aforesaid, the statement of facts distinctly sets out that "the State proved by witness William Pettis his ownership and loss of

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the cattle mentioned in the indictment, some time during the latter part of January, A. D. 1878, the range and description of the said cattle," etc.

Three main objections are urged to the charge of the court: *First*, that it failed to define a fraudulent intent; *secondly*, it failed to instruct the jury that "the defendant is presumed to be innocent until his guilt is established by legal evidence;" *thirdly*, the court did not give the defendant the benefit of the lesser penalty, as provided for by art. 2410b, Paschal's Digest.

As we have before stated, no special or additional instructions were asked by defendant. Had he asked an additional and appropriate instruction, defining more fully a fraudulent intent, and the court had refused to give it, we would have been prepared to say whether it was error or not. *Johnson v. The State*, 1 Texas Ct. App. 118. But in our opinion the charge of the court was sufficiently full upon the subject; for, in addition to the statutory definition of theft, the judge in a subsequent paragraph made a direct application of this definition to the facts in the case, and the jury could not have been ignorant or have misunderstood what were the constituent elements of the crime, necessary to be ascertained and found, to warrant a verdict of guilty.

With regard to the presumption of innocence, whilst it has ever been held a ground of reversal where the court has refused to give it when properly asked, and whilst it is generally agreed that it would always be better for the court to give it in charge, in connection with the reasonable doubt, in the language of the statute (Pasc. Dig., art. 3105), yet we know of no case in our own or other States which has gone to the extent of reversing a judgment for the want of such an instruction, where it was not expressly asked and refused. *Thomas v. The State*, 40 Texas, 36; *Black v. The State*, 1 Texas Ct. App. 368; *Coffee v. The State*, 5 Texas Ct. App. 545; *McMullen v. The State*, 5 Texas Ct. App. 577, and authorities collated.

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A reasonable doubt must be charged in every felony case, whether asked or not; it is error to refuse to charge the presumption of innocence, whenever asked. The court in this case charged the reasonable doubt.

As to the third objection, — that the court did not charge the law covering a lesser degree of offence as defined by art. 2410b, Paschal's Digest, for removing live stock from its accustomed range, — it is only necessary to reply that the count upon which he was tried charged only theft; and as for the evidence, whilst it did show defendant in possession of the cattle, and that he branded, and changed the marks and brands on them, at Blair's pen, in Burnet County, it does not show that Blair's pen was not within the limits of their accustomed range. And though the cattle were subsequently found by the owner, and driven back from Sam Brown's ranch, in Lampasas County, a distance of forty-five miles from Blair's pen, the evidence does not disclose who drove them to that point, or that defendant was ever seen with them after they left Blair's pen. This being the state of the evidence, there was nothing calling for or requiring a charge upon a state of case not made, so far as this defendant is concerned, by the evidence. *Marshall v. The State*, 4 Texas Ct. App. 549; *Haynes v. The State*, 40 Texas, 52. The facts in this case make it essentially different in this regard from the cases of *Campbell v. The State*, 42 Texas, 593, and *Slack and Payton v. The State*, decided by this court at the Austin term, 1879, and published in the "Texas Law Journal," Vol. 3, No. 8 (October 22, 1879). We believe the charge of the court fully presented the law of the case, and was as favorable to the defendant as the law and the facts warranted.

Nor was error committed in overruling defendant's motion for a new trial. It may be conceded that in his supplemental motion defendant makes quite a strong showing in support of his *alibi*. Still he has not brought him-

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self within the rules for newly discovered evidence; and in addition to the fact that the evidence sought cannot be said to be newly discovered, it is further obnoxious in that it is simply cumulative of evidence already adduced on the trial. *Johnson v. The State*, 2 Texas Ct. App. 456; *Harmon v. The State*, 3 Texas Ct. App. 51.

We have endeavored to meet all the points made and relied upon by the able counsel representing appellant. Our conclusion upon the whole case before us is that defendant has been fairly tried and legally convicted, and, being unable to see any good and valid reason why the conviction should not stand, that it is our duty to affirm the judgment; and it is accordingly so done. The judgment is affirmed.

Affirmed.

S. COLTON v. THE STATE.

CONTINUANCE. — Defendant moved for a continuance because his ignorance of the indictment against him, and his imprisonment, disabled him from procuring witnesses to prove an *alibi*; but his motion named no witnesses, and gave no assurance that he could produce any if the continuance was granted. *Held*, that the showing fell far short of a legal one for a continuance, and did not even constitute a reasonable appeal to the discretion of the judge over the subject.

APPEAL from the District Court of Franklin. Tried below before the Hon. B. T. ESTES.

The appellant was indicted and convicted of breaking open the jail at Mount Vernon, the county-seat of Franklin County, on August 15, 1878, with intent to effect the escape of one Peter Moore, confined therein. The jury consigned appellant to the penitentiary for a term of six years.

No brief for the appellant.

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Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. A bill of exceptions, the only one in the transcript, states “that on the trial of this cause the defendant, by his counsel, asked the court to continue same, because the indictment states the time of the breaking of jail to be on the 15th day of August, 1878, which was not the correct date of the occurrence, as the defendant was this day informed; that said indictment had not been made public, nor was the defendant apprised that there was such indictment against him, until his arrest on the 20th day of March, 1879; that since his arrest he had been confined in jail, and had not been able to ascertain the time of breaking; he could not prepare for trial by having witnesses served with process to prove his (defendant’s) whereabouts at the actual time of breaking; that the *capias* was served on defendant on March 20, 1879.” The bill of exceptions further shows that the court overruled the motion for a continuance, and that the defendant excepted to the ruling.

We are unable to see that if the matter contained in the bill of exceptions had been presented in the form of an affidavit, and duly sworn to by the defendant in person, it would have constituted a good ground for continuance, or even a reasonable appeal to the discretion of the court to continue the trial. It shows neither diligence, materiality, nor a probability of procuring the testimony at a subsequent term, even if it had tended to disprove the charge against him.

The motion in arrest of judgment is not set out in the transcript, nor are the grounds upon which it is made set out in the record. The only grounds of the motion for a new trial are, that the verdict is against the law as charged, and that it is against the evidence. From an examination of the case, in the absence of a statement of facts, we fail to discover any merit in the motion, and upon the whole we are of opinion the record discloses a fair and legal conviction,

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in a court of competent jurisdiction, on a sufficiency of evidence, and under a valid indictment. The judgment is affirmed.

Affirmed.

E. M. WALKER v. THE STATE.

1. **INDICTMENT.** — The objection that an indictment does not show on its face that it was presented in the proper court is not one of substance; but if true in fact, and not cured by amendment, is good cause in support of a motion to quash.
2. **SAME — MINUTES OF COURT.** — It is a requirement of the Code that the fact of the presentment of an indictment in open court by the grand jury shall be entered on the minutes of the proceedings of the court; and this duty should not be neglected.
3. **TRANSFER OF CAUSES FROM THE DISTRICT COURTS TO INFERIOR COURTS.** — The Code requires each district judge, at the end of each term of his court, to make an order transferring to inferior courts such criminal cases as pertain to their jurisdiction, specifying the cases, and the courts to which they are transferred; and the district clerk is required to deliver to such courts the transferred indictments and all papers relating to the cases, and to "accompany each case with a certified copy of all the proceedings taken therein in the District Court," etc. *Held*, that the certified copy thus required of the clerk should comprise the entry on his minutes of the presentment of the indictment by the grand jury, and all other record-entries relating to the case. Note the *quære* in *McDonald v. The State*, *post*, p. 118.
4. **SAME — SEAL OF COURT.** — The certified copy must be authenticated over the seal of the District Court.

APPEAL from the County Court of Camp. Tried below before the Hon. W. P. SKEEN, County Judge.

R. W. Hudson, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was indicted in the District Court, and tried and convicted in the County Court, on a charge of aggravated assault. A motion was made in the County Court to quash the indictment on the following

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grounds : *First*, because it does not appear from the face of the indictment that it was presented in the District Court of Camp County, or in a court having jurisdiction of the offence charged ; *second*, because there is no certified transcript of the proceedings in the District Court ; *third*, because what purports to be the transcript fails to show that the indictment was found by the grand jury of the county, and by it “ presented to the District Court as required by law, a quorum of said jury being present at the time ; ” and, *fourth*, because what purports to be the transcript of said case is not under the seal of the District Court, and is insufficient in law without it.

The motion to quash the indictment was overruled, and a bill of exceptions taken to the ruling, which presents the only matters upon which reliance is placed for a reversal of the judgment.

The first ground of the motion to quash arises upon the face of the indictment. The precise objection to the indictment is that it does not contain one of the essential qualities required by the Code, thus : “ It must appear therefrom that the same was presented in a court having jurisdiction of the offence set forth.” Code Cr. Proc., art. 395, subd. 2 ; Rev. Code Cr. Proc., art. 420, cl. 2. The present clause is : “ It must appear therefrom that the same was prosecuted in the District Court of the county where the grand jury is in session.” The clause of the article first above set out was the law in force when the proceeding under consideration took place, and by it the sufficiency of the indictment must be tested. The objection is not one of substance, and does not go to the foundation of the prosecution ; but, being taken advantage of in time for the omission to have been supplied by amendment, the motion to quash should have been sustained. *Hauck v. The State*, 1 Texas Ct. App. 357 ; *Long v. The State*, 1 Texas Ct. App. 466 ; *Bosshard v. The State*, 25 Texas (Supp.), 207 ; *The State v. Hilton*, 41 Texas, 565 ; *Matthews v. The State*, 44 Texas, 376.

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For the rules relating to amending indictments or informations, in matters of form, see Rev. Code Cr. Proc., art. 549 *et seq.*

Another ground of objection is to the effect that the record does not show that the indictment was presented in the District Court by the grand jury, a quorum thereof being present. By art. 389, as amended by act of May 25, 1876 (Gen. Laws 1876, sect. 8), it is provided that "the fact of the presentment of the indictment in open court by the grand jury shall be entered upon the minutes of the proceedings of the court, noting briefly the style of the criminal action and the file-number of the indictment, but omitting the name of the defendant unless in custody or under bond." This was the law in force at the time the indictment purports to have been presented. The law now in force is the same. Code Cr. Proc., art. 415. This duty should not have been omitted. *Hardy v. The State*, 1 Texas Ct. App. 556.

The other grounds of the motion relate to the manner of certifying the proceedings had in the District Court to the County Court, the principal objection being that the certificate is not under the seal of the District Court. The seal of the District Court "shall be used to authenticate the official acts of the clerk." Rev. Civ. Stats., art. 1131. The act of August 12, 1876, required "that, at the end of each term of the District Court of each county in this State, the district judge shall make an order transferring all criminal cases over which the District Court has no jurisdiction to the several courts in the county having jurisdiction over the respective cases, and shall state in his order the causes transferred and to what courts they are transferred;" and that the clerk of the District Court shall deliver the indictments and all papers relating to each case to the proper court or justice, as directed in said order, and accompanying each case with a certified copy, etc. Gen. Laws 1876, p. 135. These provisions were substantially reenacted and

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embraced in the Revised Code of Criminal Procedure, arts. 435, 437. What purports to be a transcript of the proceedings had in the District Court in the present case is as follows:—

“THE STATE OF TEXAS. No. 206. *Aggravated assault and battery. November Term, 1879. District Court, Camp County, Texas.*

“Ordered by the court that this cause be transferred to the County Court of Camp County, and that the clerk certify the papers, and cost of same. I certify that the above is a true copy of the case as it remains on the minutes of said District Court. Clerk’s fees, \$2.

[Signed] “J. T. BOHANNON,
“*District Clerk.*”

This does not purport to be certified as a transcript from the records of the District Court, embracing all that appears on the record. Among other things, it does not show that the indictment was returned into the District Court by the grand jury. But besides this the document is not authenticated by the seal of the District Court. If it had been full and complete in other respects, it was not entitled to be considered, for the want of a seal.

The court erred in overruling the motion to quash the indictment, which error should have been corrected on the motion for a new trial; and for this the judgment must be reversed and the case remanded.

Reversed and remanded.

J. M. RIVIERE ET AL. v. THE STATE.

1. **RECOGNIZANCE.**—Sureties on a recognizance for an appeal are responsible for the appearance of their principal before the court below, after a reversal of the judgment and remand of the case wherein the appeal was taken.

Opinion of the court.

2. **SAME — ESTRAY LAW.** — Recognizance stated the offence as the “unlawfully taking up and using an estray,” but omitted the supplementary clause, “without complying with the law regulating estrays.” *Held*, that this latter clause is essential to a description of the offence, and its omission is fatal to the recognizance.

APPEAL from the Criminal Court of the city of Waco.
Tried below before the Hon. N. S. BATTLE.

The opinion states the case. The judgment appealed from was rendered in March, 1876, and before the abrogation of the Criminal Court of Waco by the present Constitution.

John L. Dyer, for the appellants.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. One Owens was indicted under art. 2441, Paschal's Digest, for a violation of the estray laws. After arrest he executed a bail-bond to appear and answer the indictment. He did appear, was tried and convicted, and appealed the case to the Supreme Court, and these appellants became sureties in the recognizance. The judgment was reversed, and the cause remanded for a new trial. Owens failing to appear, a judgment *nisi* was rendered on the recognizance, with *scire facias* to the sureties.

The main ground of defence in the lower court, and one which is still insisted upon here, is that the reversal of the case placed the cause “as it would have stood in case a new trial had been granted in the District Court” (Pasc. Dig., art. 3139); and that “the effect of a new trial [in the District Court] is to place the cause in the same position in which it was before the trial had taken place.” From which it is said it must follow that the effect of the reversal was also to render the recognizance *functus officio*, and that the State must look to and forfeit the appearance-bond, and that alone, in case defendant fail to make appearance, as

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was done in this case. This was the identical question made in *Weaver v. The State*, and our Supreme Court held that "sureties on the recognizance are responsible for the appearance of the accused in the District Court, after a reversal of the judgment from which the appeal was taken wherein the recognizance was given." 43 Texas, 386.

But the recognizance is fatally defective in that it does not set forth any offence against the laws of the State. Pasc. Dig., art. 2731, subd. 3. The recognizance describes the offence as the "unlawfully taking up and using an estray," but omits to charge that the act was done "without complying with the laws regulating estrays." Pasc. Dig., art. 2441. The words "without complying with the laws regulating estrays" are essential to a description of the offence. *Hutchinson v. The State*, 26 Texas, 111; *Davis v. The State*, 30 Texas, 352; *The State v. Meschac*, 30 Texas, 518; *Estray Cases*, 31 Texas, 205; *Hicks v. The State*, 32 Texas, 368; *Stewart v. The State*, 37 Texas, 576.

Because it does not appear from the recognizance that the defendant or principal was charged with an offence against the laws of the State, the judgment of the court below is reversed and the prosecution dismissed.

Reversed and dismissed.

JAMES CLARK v. THE STATE.

THEFT — FACT CASE. — Note in the opinion a state of proof held to be too inconclusive to exclude a reasonable doubt of a felonious intent in a case of theft.

APPEAL from the District Court of Wood. Tried below before the Hon. J. C. ROBERTSON.

The evidence is recapitulated in the opinion of the court.

L. Z. Wright, for the appellant.

Opinion of the court.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Four parties were jointly indicted in this case, for theft of a hog. On motion of Martin Clark, one of the co-defendants, a severance was granted, and appellant and the two other defendants were jointly tried and convicted. A new trial was granted the other defendants, and refused as to appellant. When the case was called for trial as to Martin Clark, the remaining defendant, it was continued on his application for a witness by whom he expected to prove the ownership of the animal to be in himself.

The statement of facts shows the case against appellant to be in effect and substantially as follows, viz.: That appellant was met on horseback in Lake Fork bottom by the witness Johnson. He had a hog, the head and shoulders of which were in a sack on his horse before him. He told Johnson that he, Allen, and Dock were helping Martin Clark to kill hogs, and the one he had was Martin's. Johnson asked in what mark the hog was, and defendant described the mark, but witness found the mark to be different to the description when defendant at his request exhibited it to him; which, he says, defendant did without hesitancy. About this time, Allen and Dock came up, and Allen said he had shot the hog for Mart's hog, — "that he knew it was Mart's; that he knew the hog when he shot it, without looking at the mark; that he had helped to mark it, and that it was in the Born Good (old) mark." The hog was in Isom Hay's (the alleged owner's) mark. Johnson, the witness, further says: "I do not know that the hog was Isom Hay's. They told me they were killing hogs for Martin Clark. They did not try to conceal the hog, and showed me the mark willingly. They did not claim it as their own." On the following day, appellant went with another witness named Johnson, and Isom Hay, the alleged owner, to Martin Clark's, where the hog was cut up and in the smoke-house, and there inspected the head, and identified the mark as

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Hay's. Johnson, the witness, says: "Jim [appellant] did not try to conceal any thing from me, but told me frankly, as best he could, all about it; did not claim any interest in the hog, but said it was killed as Martin's hog." Isom Hay, the alleged owner, after describing his hog, and stating that the hog's head which he saw at Martin Clark's was in his mark, and that he knew of no other mark in that range like his, said that, some months before, he had described the hog to defendants, and authorized them to kill it and send him one-half of it; that he had never countermanded this order, or said any thing to them about the hog but once, when they said they had not seen it. He says: "I do not know that the head of the hog I saw at Martin Clark's at the time referred to was the head of my hog, but was in my mark."

This was all the evidence, in substance. We are not satisfied that it sufficiently establishes the criminal intent, but think it is deficient in that it does not tend to show beyond a reasonable doubt that this appellant's connection with the hog was fraudulent, so as to make it theft under the law. So believing, we think the court erred in not granting a new trial on that ground. The judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN DAWSON v. THE STATE.

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DISTURBING RELIGIOUS WORSHIP.—The statute on this subject, in its spirit, object, purpose, and letter, purports to protect a religious assembly from disturbance, not only during actual services, but so long as any of the congregation remain upon the premises. See, in illustration, the facts stated in the opinion.

APPEAL from the County Court of Franklin. Tried below before the Hon. P. H. DAVIS, County Judge.

Opinion of the court.

A full statement of the material facts is given in the opinion of the court.

S. O. Moodie, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. This prosecution was for disturbance of religious worship. The statute is: "Any person who, by loud and vociferous talking or swearing, or by any other noise (or in any other way), wilfully disturbs any congregation assembled for religious worship and conducting themselves in a lawful manner, whatever may be the religion professed by such congregation, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five nor more than one hundred dollars, and may be imprisoned in the county jail not exceeding thirty days, at the discretion of the jury." Acts 1873, p. 43; Penal Code (Rev. Stats.), art. 180.

The statement of facts shows "that, after church was dismissed, and the pastor and part of the congregation on their way home, the defendant, with others, engaged in a broil, and defendant, by cursing and swearing, disturbed those then on the ground; that defendant behaved in an orderly manner so long as the pastor was present on the ground."

We are of opinion that the object, purpose, spirit, and letter of the law are to protect the religious assembly from disturbance before and after services, as well as during the actual service, and so long as any portion of the congregation remains upon the ground; and so believing, we think the defendant was rightly and legally convicted. There being no error, the judgment is affirmed.

Affirmed.

Opinion of the court.

ARTHUR COPPING v. THE STATE.

1. PLEADING. — If a statute makes it penal to do this *or* that, mentioning several things disjunctively, an indictment or information may in a single count embrace all the prohibited acts; but in charging them, it must use the conjunction *and* instead of the disjunctive *or* employed in the statute.
2. SAME — DISTURBING RELIGIOUS WORSHIP. — The above rule is applicable to the article of the Code making it a penal offence to disturb a congregation assembled for religious worship, “by loud *or* vociferous talking *or* swearing, *or* by any other noise,” etc.

APPEAL from the County Court of Bell. Tried below before the Hon. W. M. MINYARD, County Judge.

The opinion sufficiently states the case.

Monteith & Furman, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant and another were prosecuted by affidavit and information, in the County Court, under the act of April 23, 1873, and charged with the offence of wilfully disturbing a congregation of persons assembled for religious worship, alleged to have been committed on August 9, 1878. On the trial, an exception was taken to a portion of the information which describes the offence. The exception was by the court overruled, proof admitted under it, and a charge given to the jury on the subject; all of which were duly excepted to on the trial and reserved by bills of exception. The questions presented in these several forms and at different stages of the trial all depend upon the correctness or otherwise of the ruling of the court on the defendant's exception to the information; and in order to see what the precise objection is, we set out so much of the charge in the information as is necessary for that purpose, italicising the precise words to which the exception applies:

“That heretofore, to wit, on the 9th day of August,

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A. D. 1878, in the county and State aforesaid, one Arthur Copping and one Jack Slawson * * * did then and there wilfully disturb a congregation then and there assembled for religious worship and conducting themselves in a lawful manner; and the said Arthur Copping and Jack Slawson then and there, by loud talking and laughing, *and by other indecent and obscene noises*, did then and there disturb said congregation aforesaid."

Art. 284 of the Penal Code as amended by the act of April 23, 1873 (Gen. Laws 1873, p. 43), then in force, provides that "Any person who, by loud or vociferous talking or swearing, or by any other noise, wilfully disturbs any congregation assembled for religious worship, and conducting themselves in a lawful manner," etc. This statute, it will be seen, is in alternative clauses; one violation would be created, having the ingredient of wilfulness which applies to all, by disturbing by loud or vociferous talking, another by either loud or vociferous swearing, etc. In such a case the rule of pleading is thus laid down by Mr. Bishop, in his work on Statutory Crimes, sect. 383: If an indictment is to be drawn on a statute in alternate clauses, the pleader, as a general rule, to which there may be exceptions in consequence of a peculiar phraseology or a peculiar subject, may elect to charge no more than constitutes an offence within one clause, or he may proceed upon two clauses, or three, or all, as he deems best, and all in a single count, employing the conjunction *and* where the statute uses the disjunctive "or." But, though the conviction may be for the whole, it is all, when proceeded against in this way, regarded as only one offence, subjecting the offender to no more than one penalty. In like manner, the conviction may be for no more than what barely constitutes a crime. See also *Hart v. The State*, 2 Texas Ct. App. 39, and authorities there cited.

The pleader was at liberty to proceed upon any one or upon any number of the alternative clauses *disjunctively*

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named in the statute, and in one count, and the joining of more than one in an indictment or information *conjunctively* in the pleading would not invalidate it; and *noises* being one of the alternative modes by which a disturbance could under the statute be created, and it being one of those averred in the information, in the expression excepted to, the information was sufficient to apprise the accused that he would be called on to meet the charge of disturbing the congregation by making *noises* among other ways; and by employing the expression *other indecent and obscene noises*, the accused was, perhaps unnecessarily, apprised of the character of *noises* he was accused of making. We are of opinion there was no error either in overruling the defendant's exception to the information, or in admitting evidence on the subject or character of the *noises*, or in the charge to the jury on the same subject, of which the appellant can legally complain.

After carefully considering the other errors assigned, in the light of the record and the brief of the appellant, we find no such error as would warrant an interference with the verdict and judgment, and the judgment is affirmed.

Affirmed.

JACK SLAWSON v. THE STATE.

1. CONTINUANCE — SEVERANCE. — The Code authorizes a severance of defendants to enable one to obtain the testimony of the other, by a prior trial and acquittal of the latter; but this provision is based on the idea that there is no evidence against the party to be first tried, and does not contemplate that if he is convicted, and appeals, the other shall be entitled to a continuance until the appeal shall be determined.
2. PLEADING. — The rulings in *Copping v. The State*, ante, p. 61, referred to with approval.

APPEAL from the County Court of Bell. Tried below before the Hon. W. M. MINYARD, County Judge.

See the opinion for the material facts.

Monteith & Furman, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was prosecuted by information, together with Arthur Copping, and charged with wilfully disturbing a congregation assembled for religious worship. It seems that a severance was granted at the instance of the appellant, and his co-defendant was placed on trial first, and, contrary to his expectation, was convicted; whereupon this appellant moved the court to grant him a continuance, to enable him to have the benefit of the testimony of his co-defendant, and alleging that he believed his said co-defendant would appeal from the judgment, and that it would be reversed on appeal, and setting out the materiality of the testimony he expected to obtain in this manner. The court refused to continue the case, and he was tried and convicted, and assigns as error the ruling on the application for a continuance. The co-defendant of the appellant has appealed, and his appeal has been decided by this court to-day; and the only question in the present case not decided in Copping's case arises on the continuance.

We have always understood that the provision of the Code which authorizes a severance in order to procure the testimony of a co-defendant is based on the idea that there is no testimony against the one sought to be put first on trial; and that the whole object sought to be attained is defeated when, instead of acquitting, the jury convict the one so put first on trial, and that the law never contemplated that the trial of the one who procured the severance should be delayed until the legality of the conviction of the other should be determined on appeal. If the testimony of the convicted co-defendant had been of vital importance, he could have been rendered a competent witness by payment

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of his fine. We fail to discover any error in the ruling of the court.

For a discussion of the other questions raised on this appeal, see *Copping v. The State*, this day decided, *ante*, p. 61.

The judgment is affirmed.

Affirmed.

J. CRUTCHFIELD v. THE STATE.

1. **PRACTICE IN THIS COURT.** — Refusal of a continuance will not be revised unless a proper bill of exceptions thereto appears in the record.
2. **WITNESS.** — On his trial for theft, the defendant proposed to introduce as a witness a person who in a separate indictment was charged as a receiver of the stolen property. *Held*, that the proposed witness was properly excluded, in view of the provision of the Code which disqualifies principals, accessories, and accomplices from testifying in behalf of each other.
3. **CHARGE OF THE COURT.** — In the introductory portion of the charge to the jury, the court below miscalled the name of a person not on trial, but jointly indicted with the appellant. The attention of the court was not directed to the mistake at the time, but a general exception to the whole charge was taken. *Held*, not a material error, nor a matter within the purview of the general exception to the charge of the court.
4. **SAME.** — In a trial for theft wherein the State adduced circumstantial evidence only, the court below, in connection with the presumption of innocence and the reasonable doubt, instructed the jury that, to warrant a conviction, the circumstances, taken together, must be of such a character "as to be incapable of explanation upon any other rational hypothesis but that of the defendant's guilt." No additional instruction on the subject was asked. *Held*, a sufficient charge on the subject.

APPEAL from the District Court of Denton. Tried below before the Hon. J. A. CARROLL.

The case is sufficiently indicated in the opinion of the court.

No brief for the appellant.

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Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant and two others were jointly indicted for the theft of twenty hogs, of the alleged value of \$10 each, the property of John F. Boswell, and on a separate trial was by the jury convicted of theft of hogs of the value of \$20 or over, and his punishment assessed at confinement in the State penitentiary for a period of four years. Judgment was entered in accordance with the finding of the jury; a motion for a new trial was made and overruled, and from the judgment this appeal is prosecuted on the following assignment of errors: 1. The court erred in overruling the defendant's motion for a continuance. 2. In refusing to permit the witness John Flippin to testify in behalf of the defendant, as shown in defendant's bill of exceptions No. 1. 3. In its charge to the jury as shown in bill of exceptions No. 2. 4. In all its charges and instructions to the jury. 5. In overruling defendant's original and amended motion for a new trial.

1. As to the first supposed error assigned, it is only necessary to say that it is the established rule not to revise the rulings made below on a question of continuance, unless a proper bill of exceptions to the ruling was taken at the trial and is embodied in the transcript. *Nelson v. The State*, 1 Texas Ct. App. 41, and authorities there cited. This matter is not so presented here.

2. It is shown by the bill of exceptions referred to in the second assignment of error "that on the trial, the State having rested its case solely upon circumstantial evidence, and among other things this, that the hogs charged to have been stolen were found by one of the State's witnesses, Marsh Hill, at the house of one John Flippin, and in a pen under the control of said Flippin, and the State having closed its testimony, the defendant offered to prove by said John Flippin that the defendant never had any control of said hogs, and that two other parties, namely, William

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Bean and Charley Stephens, had alone brought the hogs to said Flippin's house and sold them to said Flippin," the county attorney objected to the introduction of this proffered witness on the ground that he stood indicted for receiving said stolen property, the indictment being produced in court. The objection of the county attorney was sustained, and the defendant excepted.

We are of opinion that by a proper application of art. 731, Code of Criminal Procedure, the court did not err in excluding the proffered testimony. The article is as follows: "Persons charged as principals, accomplices, or accessories, whether in the same indictment or different indictments, cannot be introduced as witnesses for one another; but they may claim a severance, and if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others." The only material difference between the article of the present Code, as copied above, from the article as it formerly stood is the addition of the words *or the prosecution against them be dismissed*, after the word *acquitted*; which has no bearing upon the question under consideration. *Miller v. The State*, 4 Texas Ct. App. 251.

3. The matter complained of in the third assignment of error, as disclosed by bill of exceptions No. 2, may be briefly stated as follows: The court, in the introductory portion of the charge to the jury, used this language: "In this case the defendants, John Crutchfield, Bill Bean, and Charley Stewart, are indicted," etc., giving as one of the defendants jointly indicted with this defendant "Charley Stewart," when the name in the indictment is *Charley Stephens*. In giving the bill of exceptions, the judge appends thereto the following qualification: "When the general charge of the court was read to the jury, the counsel excepted generally to the charge of the court in the case, but the special matter mentioned in this bill was not called to the attention of the court until upon the motion for a

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new trial, when said objection was overruled because the same was a clerical error." We see no error in this clerical error of which the appellant can complain. It amounts to nothing more than a mistake in the name of a person not on trial, and which would doubtless have been corrected if the attention of the court had been called to it at the proper time, — that is, when the charge was being delivered to the jury. The general exception to the charge does not cover a particular error of this character, which did not involve any question to be passed upon by the jury.

4. The fourth error appears to be a general one, apparently going to the whole charge of the court; the language employed in the assignment is, "In all its charges and instructions to the jury." There is no particular portion of the charge, other than is noticed above, pointed out by bill of exceptions. No additional instructions were asked by the defendant's counsel, so far as the record discloses. Without any guide to any supposed defect in the charge, we fail to see any such error committed by the court in its instructions to the jury as was likely to mislead them in a proper application of the law to the testimony in determining the question submitted for their consideration.

5. We do not deem it important to notice specially but one of the grounds set out in the motion for a new trial. The fifth ground of the motion is as follows: "This being a case of circumstantial evidence, the court ought to have charged the jury that each fact or circumstance relied on by the State for a conviction ought to be proved with as much certainty as though a conviction depended on it alone."

On this branch of the case the court, in a separate paragraph, instructed the jury as follows: "In this, as in other criminal actions, the defendant is presumed innocent until his guilt is established by testimony to the satisfaction of the jury beyond a reasonable doubt; and when a conviction is sought alone upon circumstantial testimony, the circumstances, taken together, must be such as to be incapable of

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explanation upon any other rational hypothesis but that of the defendant's guilt; and if, after a careful consideration of all the testimony in the case, there is in your minds any such reasonable doubt of the defendant's guilt, you will acquit."

We are of opinion the charge as quoted above was a sufficient instruction as to the conclusiveness of circumstantial evidence necessary to warrant a conviction, as well as on the presumption of innocence and reasonable doubt, when considered in the light of the testimony adduced on the trial. For the rule as to the conclusiveness of circumstantial evidence, see *Rodriguez v. The State*, 5 Texas Ct. App. 256, and authorities there cited. When the court has charged the jury as to the law of the case on trial before it, and counsel shall deem the charge defective in reference to any particular, it is their privilege and duty to request a further charge on that particular subject; and, finding none such, we conclude that the charge as given was satisfactory at the time.

We can but regret that there has been no appearance here of counsel for the appellant. Still we have carefully considered the case as presented by the record, and find no such error as would warrant a reversal of the judgment, and it is affirmed.

Affirmed.

E. D. HILLIARD v. THE STATE.

1. **ILLEGAL PRACTICE OF MEDICINE.** — Under the provisions of the act of 1876, "to regulate the practice of medicine," no class of medical practitioners can pursue their profession in this State without a certificate of qualification, except those who for five consecutive years prior to January 1, 1875, were regularly engaged in the general practice of medicine in this State.
2. **SAME.** — A certificate of qualification conforming to the provisions of said

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act of 1876 is an indispensable prerequisite to all practitioners of medicine in this State, except, *first*, the aforesaid veteran class, who need no certificate at all; and, *second*, those who, prior to the act of 1876, obtained certificates of qualification under the act of 1873.

3. **SAME.** — Before any certificated physician can lawfully engage in practice, his certificate must be furnished to the district clerk of the county of such physician's residence or sojourn, and the appropriate entries be made by the clerk upon his record, as required by the act of 1876.
4. **SAME.** — A certificate of qualification obtained and recorded under the act of 1873 protects the practitioner while he resides or sojourns in the county where it has been recorded; but if he changes his domicile to another county, he must, before there engaging in practice, furnish his certificate to the district clerk of the latter county for record.
5. **SAME.** — The object of the said "act to regulate the practice of medicine" is the protection of the people against quack doctors and medical charlatans, and its provisions are to be construed in harmony with its purpose and policy.

APPEAL from the County Court of Falls. Tried below before the Hon. E. C. STUART, County Judge.

The case is clearly stated in the opinion of the court.

J. S. Scott, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. In order to determine the merits of this case as presented by the record, it is only necessary to arrive at the proper construction of portions of the second and fifth sections of "An act to regulate the practice of medicine." Gen. Laws 16th Leg. 231 (Rev. Stats., Penal Code, arts. 396-399).

These two sections read as follows, viz. :—

"Sect. 2. That every person who may hereafter engage in the practice of medicine, in any of its branches or departments, in this State, shall, upon entering upon such practice, furnish to the clerk of the District Court of the county in which such practitioner may reside or sojourn, his certificate of qualification; and said clerk shall enter the name of such person in a well-bound book kept in his office for that pur-

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pose, together with the time when, the place where, and the person or persons by whom such certificate of qualification was given ; after which he shall return the certificate to the owner thereof," etc.

" Sect. 5. That any person violating any of the provisions of this act shall be guilty of a misdemeanor ; * * * *provided*, that nothing in this act shall be so construed as to exclude or disqualify any person who may have been already qualified for the practice of medicine under the act of May 16, 1873 ; *provided*, that nothing in this act shall be so construed as to apply to those who have been regularly engaged in the general practice of medicine in this State in any of its branches or departments for a period of five consecutive years in this State, prior to the first day of January, 1875 ; nor to those who have obtained certificates of qualification under said act," etc.

Plainly deducible from the language thus used, in our opinion the intention of the Legislature can readily be formulated in the following propositions : —

1. But one class of medical practitioners may pursue their profession without first obtaining a certificate of qualification, viz. : those who have been regularly engaged in the general practice of medicine in the State for five consecutive years prior to the first day of January, 1875.

2. But two classes are allowed to practise medicine without having first procured a certificate of qualification under the act of 1876, and they are, *first*, those who have been engaged in the general practice in the State five consecutive years before and up to the 1st of January, 1875 ; and, *second*, those who have theretofore obtained their certificates of qualification under the act of May 16, 1873.

3. In all other cases a certificate of qualification must, as a condition precedent (sect. 1, art. 1876, p. 231), not only be obtained, but, further, be furnished to the district clerk, and the appropriate entries concerning it be made by him, before the party holding it can legally enter upon and engage in the practice. (Sect. 2.)

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4. In all those cases where a certificate of qualification may have been obtained by virtue of, and been duly recorded under the provisions of, the act of 1873, in the county where the party then resided or sojourned to practise, it would protect him so long as his place of residence remained unchanged. But whenever he changed his domicile, or went to sojourn in another county, its protecting power would not avail, nor could he legally engage in the practice in this latter county until after he had furnished the clerk of this last county with his certificate, in order to have it properly entered of record again, as provided in sect. 2.

With regard to the last proposition, it seems to us that no other legitimate construction would be in accord with the evident intention of the Legislature in the passage of the act. And such construction was likewise given by the court as a necessary inference to be drawn, under similar provisions, from the general import and object of the act of 1873, in the case of *Goldman v. The State*, 44 Texas, 104.

The object of the law was to protect the people of the State against charlatans and quacks. To attain this purpose most effectually, no better plan, or one more simple or practical, could have been devised than to require that the people at least should be notified in advance, or have at their command the means of notifying themselves, of the authority and qualifications of those proposing to engage in a profession so nearly affecting the lives and health of themselves and families. Without some such notice and information, the law would become entirely nugatory.

In the case at bar, the defence was that appellant had previously obtained a certificate of qualification in Harrison County, Texas, under the act of 1873. The evidence shows that he removed to, resided in, and was practising medicine, in 1879, in Falls County, without having furnished the district clerk of the latter county with his certificate of qualification. In the view we have expressed of the law, he was clearly liable for its violation. This renders it unnecessary

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for us to pass upon the correctness of the ruling of the court in excluding what purported to be the evidence of his certificate under the act of 1873, which was the only other question in the case.

There being no perceivable error in the proceedings or the judgment, the judgment is affirmed.

Affirmed.

GEORGE SWINK v. THE STATE.

INFORMATION. — Variance between the date of the offence as alleged in the affidavit and as charged in the information is fatal to the latter and to the entire proceeding.

APPEAL from the District Court of Bowie. Tried below before the Hon. B. T. ESTES.

The information charged the appellant with a petit theft, and was originally instituted in the County Court, but was transferred thence to the District Court in compliance with an act of 1879 which divested the criminal jurisdiction of the County Court of Bowie, and of several other counties, and restored it to their District Courts.

Hubbard & Whittaker, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. It has been repeatedly held that a variance between the affidavit and the information with regard to the allegation of the time or date of the commission of the offence would be fatal to the validity of the prosecution and conviction. *Hoerr v. The State*, 4 Texas Ct. App. 75; *Collins v. The State*, 5 Texas Ct. App. 37; *Williamson v. The State*, 5 Texas Ct. App. 485; *Hawthorne v. The State*, 6 Texas Ct. App. 562.

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In this case the affidavit or complaint alleges that the offence was committed on the first day of January, A. D. 1879, while the information avers it to have been committed on the first day of June, A. D. 1879. On this ground, if for none other, the court erred in overruling defendant's motion in arrest of judgment. For this error the judgment is reversed, and, the variance being fatal to the legality and validity of the prosecution, the case is dismissed.

Reversed and dismissed.

J. W. TOWNSEND ET AL. v. THE STATE.

APPEARANCE-BOND bound the principal obligor "in the sum of one hundred and fifty dollars, and the sureties in — dollars." *Held*, that the terms of the bond preclude a construction making the sureties jointly bound with their principal in the sum designated; and, failing to show that they were bound in any sum whatever, it is nugatory as to them.

ERROR from the District Court of Brown. Tried below before the Hon. J. R. FLEMING.

The opinion states the case.

G. J. Goodwin, for the appellants.

Thomas Ball, Assistant Attorney General, for the State.

WHITE, J. These appellants were sureties on the appearance-bond of one Scott. The bond is in these words, viz.: "Know all men that we, Sam Scott as principal, and J. W. Townsend and J. J. Maynard as securities, acknowledge ourselves bound unto the State of Texas, the said principal in the sum of one hundred and fifty dollars, and the sureties in — dollars each," etc. Nowhere in the bond is it stated in what sum the sureties were bound.

In answer to the *scire facias* on the forfeited bond, the

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defendants appeared, and these sureties moved to set aside the judgment *nisi* because they were not obligated by the bond to pay any sum at all on the failure of their principal to appear. The court overruled the motion, and rendered judgment final against the principal and sureties for \$150.

So far as the sureties are concerned, the judgment is clearly erroneous. The language of the bond precludes, in the first place, the idea that the sureties intended to bind themselves, jointly with their principal, in the sum of \$150; and, not intending to bind themselves in that sum, in the next place have they bound themselves in any sum? If so, what sum? The bond, which alone should answer, is silent and a blank, and there is no other evidence on the subject. We do not think they were bound in any sum. Wherefore the judgment is reversed and the cause remanded.

Reversed and remanded.

DE WITT YOUNG v. THE STATE.

AGGRAVATED ASSAULT — FACT CASE. — Note a state of proof held insufficient to sustain a conviction of aggravated assault with a gun, the acts of the accused being deemed indicative of preparation merely, rather than of an attempt or purpose to inflict immediate injury or violence.

APPEAL from the County Court of Henderson. Tried below before the Hon. W. L. FAULK, County Judge.

A clear and compendious statement of the material evidence is given in the opinion of the court.

Robertson & Finley, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Properly considered, we are of opinion that the only material question involved in this case is the suffi-

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ciency of the evidence to sustain the judgment of conviction. The information charged defendant with, and he was found guilty of, an aggravated assault, alleged to have been committed with a gun, — a deadly weapon.

Without attempting to detail the statements of the several witnesses, we will give in substance the main facts as testified to by the assaulted party and by the principal witness for the defence, the latter having been jointly charged in the information with appellant in the commission of the offence, but who, before this trial took place, had been tried and acquitted.

It appears that Green Wright, the assaulted party, had heard that the defendant, De Witt Young, had been dogging his hogs, and he went to the field of the latter to see him about it. When they met, Young was on horseback inside the field, and Wright remained on the outside, the fence being between them. A wordy altercation ensued, during which Gus Griffin, who had been hunting, came up with a gun in his hands. About this time, defendant cursed Wright (who had one hand in his coat pocket, and kept it there during the difficulty), and Wright pushed defendant with his fist. Defendant attempted to get hold of Griffin's gun; but failing, went off hurriedly, saying, "You stay here till I come back, and d—n you, I will move you." Wright and Griffin then separated, Wright saying he was going to town to report Young. Griffin started on towards Edy Dixey's house, and before reaching there was overtaken by defendant, Young, who had a rifle and bag of corn. Griffin told him that Wright was going to town to report him.

Shortly after, the parties were sitting on the gallery of Edy Dixey's house, talking about the difficulty, when Wright was seen coming up the road on horseback, on his way to town. Defendant said, "There comes the d—d rascal now;" and got off the gallery and went towards the fence where Wright would have to pass, and to within five or ten steps of him, the fence being between them; when he said,

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according to Wright's evidence, "Now, G—d d—n you, I am ready to fight you." As he said this he was advancing with the gun in his hands, "one hand on the barrel and the other back about where the lock and triggers were." He said, "You report me, G—d d—n you; you had better be baptized before you report me. If you report me you will never report another man." * * * "He held his gun in both hands, the muzzle being in front and inclined rather downward. It was a rifle gun. I don't know whether it was cocked or not. The defendant did not point the gun at me, in a shooting position. There was nothing in the way between defendant and me, to prevent him from shooting me. No person prevented him from shooting me, or in any way interfered with him."

The witness Griffin says: "Defendant had his gun in his right hand; he did not point the gun at Green [Wright]. It was not cocked. Defendant then told Green, 'Now, d—n you, I am ready to fight you any way; you haven't got your hand on that d—d derringer now.' * * * He was close enough to shoot; nothing was between them."

Wright says he did not halt, but went on, telling the defendant not to shoot him with the gun.

In *Johnson v. The State*, 43 Texas, 576, where the facts with regard to the extent to which defendant's gun was used are similar to those stated above, the court say: "The evidence is entirely deficient in showing any distinct act on the part of the defendant indicating an effort then to shoot William Ross, or otherwise use the gun which he held in his hands in such manner as to inflict violence upon his person. In every assault there must be an intent to injure, coupled with an act which must at least be the beginning of the attempt to injure then, and not an act of preparation for some contemplated injury that may afterwards be inflicted. *Higginbotham v. The State*, 23 Texas, 574.

This case is different from the case of *Cato v. The State*, 4 Texas Ct. App. 87, where the defendant cocked and actu-

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ally presented his pistol at the assaulted party. In that case the court say: "The drawing and presenting a cocked pistol at Ladd by defendant, accompanied by the language, 'take it back or he would uncap him or blow his d—d brains out,' were, as was said by our Supreme Court in *Bell v. The State*, 'in part execution of a purpose of violence, and clearly an assault.'" 29 Texas, 494.

The evidence is insufficient to support the verdict and judgment, which should have been set aside by the court and a new trial awarded. Because the evidence is insufficient, the judgment is reversed and cause remanded.

Reversed and remanded.

W. IRVIN v. THE STATE.

1. **FORMER ACQUITTAL** constitutes no defence against a charge of which the accused could not have been convicted in his former prosecution. Note the illustrations of this principle collated in the opinion of the court.
2. **MALICIOUS MISCHIEF.**—Under the provisions of the Penal Code, the wilful killing, etc., of certain animals, with intent to injure the owner, is a different offence from the wilful and wanton killing, etc., of such animals, the property of another; and in a prosecution for one of these offences a conviction for the other could not legally be had. Therefore a former acquittal of one of these offences is no defence against a prosecution for the other, though both prosecutions were based on the same acts of the accused.

APPEAL from the County Court of Johnson. Tried below before the Hon. W. J. EWING, County Judge.

W. Poindexter, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. At the March term, 1879, of the County Court of Johnson County, an information was filed against the appellant, William Irvin, charging him with wilfully and

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wantonly killing one certain swine, the property of A. J. Pierce.

The appellant moved to quash the indictment, *first*, because the same charges no offence against the laws of the State of Texas; *second*, because the same does not allege that the defendant killed the swine without the consent of the owner thereof.

And appellant, for special plea in bar, pleaded a former acquittal; "that at the February term of this the County Court of said county, and in said County Court at a regular term thereof, this defendant was tried and acquitted of the offence in the information in this cause charged against defendant, and that the said offence of which this defendant was so tried and acquitted was the same and no other offence than that in the information in this cause charged against defendant; and of this defendant puts himself upon the country," etc. The appellant also pleads not guilty. The court overruled, and we think properly, the appellant's motion to quash the indictment.

An indictment found under art. 2345, Paschal's Digest, which was enacted for the protection of certain dumb animals, need not allege the ownership of the animal killed, or that it was killed without the consent of the owner. *Rose v. The State*, 1 Texas Ct. App. 401.

On the trial of the cause, the appellant, in support of his plea of former acquittal, offered in evidence the affidavit of A. J. Pierce against William Irvin *et al.*, in the case of *The State of Texas v. Wm. Irvin, Matthew and John Irvin*, which is as follows, to wit:—

"THE STATE OF TEXAS, {
 Johnson County. }

"Personally appeared before me, the undersigned authority, A. J. Pierce, who, after being duly sworn, upon his oath says that John Ervin, Wm. Ervin, and Matthew Ervin did, in the county of Johnson and State of Texas, on or about the 12th day of August, 1878, wilfully kill nine certain head of

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swine, the property of A. J. Pierce, with the intent to injure the owner thereof, and to the injury of the owner thereof forty dollars, against the peace and dignity of the State ; ” which was duly sworn to by affiant before a proper officer. To the introduction of which the attorney for the State objected, upon the ground that defendant in that affidavit was charged with killing the hogs with intent to injure the owner thereof, and that defendant was now on trial for wantonly killing the same ; and that the two were different and distinct offences.

Appellant also offered in evidence the information filed in the case of *The State of Texas v. Wm. Ervin et al.*, on the — day of September, A. D. 1878, upon the affidavit of said A. J. Pierce, charging the defendant with killing nine head of swine, the property of said Pierce, with the intent to injure the owner thereof, etc.

Appellant also offered in evidence a certified copy of the judgment of the County Court of Johnson County in the case of *The State of Texas v. Wm. Ervin and Matthew Ervin*, rendered at the February term, 1879, thereof, in which defendant was adjudged not guilty ; to which the counsel for the State objected, substantially for the same reasons that he objected to the introduction of the affidavit offered in evidence. The appellant introduced Matthew Irvin, and offered to prove by him that the swine for the killing of which appellant was on trial was included in the nine head killed, for which appellant was tried and acquitted at the February term, A. D. 1879, of said County Court, and that at said February term of the court appellant was tried for killing the same identical swine, and at the same time and place, for which defendant was now being again tried ; to the introduction of which evidence the county attorney objected upon the following grounds, to wit : —

1. Because, admitting the swine and the act to be identical and the same, the prosecution in the first case was no bar to this prosecution, because in the first case defendant was charged with killing the swine with the intent to injure

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the owner, and in the second with wantonly killing the same.

2. Because a prosecution and acquittal under art. 2344 of the Criminal Code would not bar a second prosecution under art. 2345 of the Criminal Code, the two statutes being for different offences altogether.

The objections of the county attorney to all the foregoing evidence offered by appellant in support of his special plea of former acquittal were sustained by the court; to which the defendant excepted, and saved a bill of exceptions.

In *autrefois acquit*, it is necessary that the prisoner could have been convicted on the first indictment of the offence charged in the second. The Supreme Court of Mississippi say: "When the verdict of a jury amounts to an acquittal from the offence specifically charged in the indictment, it will bar another prosecution for the same offence. *Norman v. The State*, 24 Miss. 54. In the case of *The State v. Revels*, Busb. L. 200, a person was indicted for stealing a sheep, the property of A., and acquitted on the ground that the owner was unknown. He was then again indicted for the same offence, the sheep being charged to be the property of some one to the jurors unknown. *Held*, that the former acquittal was not a bar to a conviction upon the second indictment."

The Supreme Court of Texas, in the case of *Morgan v. The State*, 34 Texas, 677, say that, "though a defendant has been acquitted on an indictment for theft of money alleged to belong to, or to have been taken from the possession of, one person, he may lawfully be tried and convicted, on a different indictment, for the theft of the same money as the property, or as taken from the possession, of a different person. In such a case, though both indictments are founded on one and the same physical act, yet their legal effect is different, and in a legal sense they charge distinct offences; wherefore neither the Bill of Rights nor the plea of former acquittal will avail the defendant in bar of a

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second indictment.” (Citing *Swindel v. The State*, 32 Texas, 102.¹)

The rule seems to be well settled that a former trial is not a bar unless the first indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment. *Burns v. The People*, 1 Park. Cr. 182; *Price v. The State*, 19 Ohio, 423; *The Commonwealth v. Wade*, 17 Pick. 395; *The Commonwealth v. Roby*, 12 Pick. 496.; *The State v. Birmingham*, Bush. L. 120; *Roberts v. The State*, 18 Ga. 8; Whart. Cr. Law, sects. 563, 565, 566. The same doctrine is declared in *Thomas v. The State*, 40 Texas, 36, and *Vestal v. The State*, 3 Texas Ct. App. 648. In the last two cases it was said: “But we do not understand from this that the first charge and trial might have been for a misdemeanor of which the accused could not have been convicted on the indictment for the second, — as, for an offence of a different nature, and not merely one differing in degree.” And where the jury could lawfully have found the defendant guilty of a lesser offence, an acquittal of a higher will be a bar to an indictment for the lower. *The State v. Standifer*, 5 Port. 523; *Tribble v. The State*, 2 Texas Ct. App. 424.

But, as before stated, so far as malicious mischief concerns wrongs done to animals, there are two separate and distinct offences defined in the two separate articles of the Code (Pasc. Dig., arts. 2344, 2345), and a party may well be tried and acquitted of one of them upon a state of facts which would warrant and support the conviction for the other, as is amply illustrated in the very case under consideration.

The charge of the court made a proper presentation of the law applicable to the facts, and submitted fairly and particularly the question necessary to be determined with

¹ The foregoing portion of the above opinion was prepared by our late presiding judge, Hon. M. D. ECTOR, and was found in the record upon his table after his death. It is perhaps the last work done by him. — WHITE, J.

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regard to the character of the offence which would exonerate one for killing the animals of another, for and after entering his enclosure. The evidence all showed that the defendant's fence was not a lawful one, nor hog-proof. The court did not err in refusing the special instructions asked by defendant; so far as they were the law, and applicable to the facts, they were covered by the general charge.

There was no error committed on the trial which would authorize us to interfere with the judgment, and it is therefore affirmed.

Affirmed.

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N. COKER v. THE STATE.

1. **INDICTMENT.** — By the recital that “the grand jurors of the State of Texas, duly empanelled, charged, and sworn to inquire of offences committed in the county of M., upon their oath present,” etc., the indictment shows on its face that it is the act of the grand jury of the county named therein. No other averment is necessary that they were the grand jurors of said county, or that they were summoned from the body thereof.
2. **SAME.** — The Constitution of 1876 has repealed the preëxisting statutory requirement that it must appear from an indictment that the same was presented in a court having jurisdiction to try the offence charged, and by its provisions all indictments are presentable exclusively in the District Courts. The Revised Code of Criminal Procedure (art. 420) conforms to the change thus effected.
3. **TRANSFER OF MISDEMEANOR CASES FROM THE DISTRICT TO INFERIOR COURTS.** — In transferring to a County Court an indictment for a misdemeanor, the district clerk accompanied it with a transcript from the minutes of the District Court, showing a regular presentment of the indictment therein, and the order of transfer, and appended to the transcript his certificate that “the above and foregoing is a true copy of the minutes of said court as regards said cause.” *Held,* a substantial compliance with the statutory requirement that the district clerk shall accompany each case with a certified copy of “all the proceedings taken in the District Court in regard to the same.” In the absence of a showing to the contrary, the presumption obtains that the minutes of the District Court show all its proceedings in regard to the case; and it has heretofore been held that the District Court, in this class of cases, can take no action save to receive the indictment and enter the order of transfer. An objection to the district

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clerk's certificate of transfer cannot, it seems, be made available by motion to set aside the indictment.

4. CHALLENGE TO THE ARRAY lies only for the single cause specified in the Code of Criminal Procedure, and consisting in corrupt action of the officer who summoned the jury, and his wilful summons of jurors prejudiced against the defendant, to secure his conviction. A failure of the jury-commissioners to sign and certify the jury-list cannot be cause for challenge to the array. *Quære*, whether such a failure could, on appeal, constitute error, without a showing that it prejudiced the appellant.

APPEAL from the County Court of Montague. Tried below before the Hon. R. D. RUGELEY, County Judge.

Every matter of any significance is disclosed in the opinion.

Grigsby & Willis, for the appellant, filed an able and ingenious brief and argument.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. This appeal is from a judgment of conviction for aggravated assault, and the errors assigned relate to the several actions of the court in overruling appellant's motion to quash the indictment on several grounds specified therein, error in the charge of the court, and in refusing to sustain a challenge to the array of jurors summoned and empanelled for his trial.

The exceptions to the indictment were to the effect that it did not appear on its face to be the act of the grand jury of Montague County, nor did it show that it was presented in a court having jurisdiction of the offence charged. The indictment recites that "the grand jurors of the State of Texas, duly empanelled, charged, and sworn to inquire of offences committed in the County of Montague, upon their oath present," etc. It is argued at some length that the indictment should aver that they were the grand jurors, not only of the State of Texas, but also of the county of Montague, and were summoned from the body of that

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county. The law has been long settled to the contrary. *English v. The State*, 4 Texas, 125; *Williams v. The State*, 30 Texas, 404; *Davis v. The State*, 6 Texas Ct. App. 133. The statutory requisite of an indictment, that it must appear therefrom that the same was presented in a court having jurisdiction of the offence set forth (Pasc. Dig., art. 2863, sect. 2), is repealed and annulled by subsequent organic provisions, and all indictments are presentable only in the District Courts. Const., art. 5, sect. 17. And the present statutory provision is now in conformity with the Constitution. Rev. Code Cr. Proc., art. 420.

The certificate of the district clerk accompanying the transfer of the case to the County Court, though not a literal compliance with the statute, seems to embrace substantially all that is required. The statute provides that in the transfer of indictments for misdemeanor from District Courts to inferior courts having jurisdiction of the offences charged, the clerk of the District Court shall deliver the indictment, and all the papers relating to each case, to the proper court or justice, as directed in the order of transfer, and shall accompany each case with a certified copy of all the proceedings taken in the District Court in regard to the same. Laws 1876, chap. 91. The record before us discloses a regular presentment of the indictment in the District Court, the order of transfer, and a certificate of the clerk "that the above and foregoing is a true copy of the minutes of said court as regards said cause." It has been held that no action could be taken by the District Court in this class of cases, save to receive the indictment and to enter the proper order of transfer. *Cassaday v. The State*, 4 Texas Ct. App. 96. Under the law, these are noted upon the minutes; and we must presume, in the absence of a showing to the contrary, that a true copy of the minutes shows all the proceedings taken in the District Court in regard to the case. It may be added that this objection does not come within the purview of the statute regulating the pleadings in criminal actions, and could not

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well be made by motion to set aside the indictment. Pasc. Dig., art. 2950.

Nor do we perceive any error in the action of the court upon appellant's challenge to the array of petit jurors. The act of August 1, 1876, and the supplemental act of August 18, 1876, relating to the organization of grand and petit juries, fail to prescribe any additional cause for challenge to the array, and the law with reference to that subject is left as it was aforesaid. The Code of Criminal Procedure provides that the defendant may challenge the array for the following cause only: "That the officer summoning the jury has acted corruptly, and has wilfully summoned persons upon the jury known to be prejudiced against the defendant, and with a view to cause him to be convicted." Pasc. Dig., art. 3034. The challenge to the array spoken of in sect. 25 of the act of August 1, 1876 (Laws 1876, p. 83), must therefore have reference to the provision above quoted, already in existence, and must be construed therewith; and to entitle a defendant in a criminal case to the exercise of that right, his cause of challenge must be brought clearly within the provisions of the Code.

In this case the cause of challenge to the array was because the jury-commissioners for the County Court had failed to sign and certify the jury-list drawn for that term of the court, and which list was tendered to defendant from which to select a jury. From the explanation of the presiding judge, appended to defendant's bill of exceptions, it appears that the list of jurors was in fact drawn by regular commissioners, and that other formalities in the law were observed; and we are not prepared to say that, even had appellant made his objection in a proper manner, it would be incumbent on this court to hold that provision of the law as mandatory, in the absence of a showing that defendant was prejudiced thereby.

Finding no error in the judgment, it is affirmed.

Affirmed.

Statement of the case.

J. A. CHAPLIN v. THE STATE.

1. **JURISDICTION OF COUNTY COURTS.** — It is settled by previous adjudications that the County Courts have jurisdiction, concurrent with Justices' Courts, of all misdemeanors cognizable by the latter courts.
2. **CONTINUANCE.** — Service of a subpoena on a witness who resides in a different county than that of the forum is not due diligence. Attachment is the process requisite for such a witness.
3. **SAME — IGNORANCE OF LAW.** — Being charged, under art. 6512, Paschal's Digest, with unlawfully carrying a pistol about his person in the county of B., the defendant sought a continuance to obtain the testimony of an absent witness, by whom he expected to prove that, being a traveller, and ignorant whether said county was one of those in which said article was in force, he made inquiry of a citizen of the county, and was told that it was not; and that, relying on this information, he openly and innocently carried the pistol about his person. *Held*, that the object of the desired testimony was to prove ignorance of law, and as that could avail nothing as a defence, the desired evidence was immaterial. *Held further*, that the fact that said county had formerly been exempted from the operation of said article does not affect the question.
4. **REPEAL — CARRYING WEAPONS.** — Though the repeal of a penal law, even while a conviction under it is pending on appeal, ordinarily exempts the offender from punishment, such a result does not ensue if legislative intention has been otherwise declared. And as the Revised Penal Code and Statutes have amply provided against such an effect on pending prosecutions, the appellant, though a traveller, and his appeal pending when they took effect, derives no immunity from the provision of the Penal Code which exempts travellers from the operation of the law against carrying certain deadly weapons, and thereby to that extent repeals the enactment under which the conviction was had in this case.

APPEAL from the County Court of Brown. Tried below before the Hon. W. H. Scott, County Judge.

The appellant was prosecuted by information in the County Court of Brown County for unlawfully carrying a pistol about his person on July 26, 1878. In August, 1878, he was convicted, and a fine of \$25 adjudged against him; and he appealed.

The material facts of the case are disclosed in the opinion. His application for a continuance alleges that the absent witness was a resident of Galveston, but was served with a subpoena in Brown County.

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Goodwin & Sadler, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. It has been held by this court, after full consideration of the various constitutional and statutory provisions relating to the jurisdiction of County Courts, that said courts are vested with jurisdiction, concurrent with courts of justices of the peace, to try and determine all cases of misdemeanor, save such as involve official misconduct, even though the penalty prescribed may be by fine of less than \$200. *Woodward v. The State*, 5 Texas Ct. App. 296; *Jennings v. The State*, 5 Texas Ct. App. 298; *Solon v. The State*, 5 Texas Ct. App. 301; *Leatherwood v. The State*, 6 Texas Ct. App. 244. It follows, therefore, that appellant's plea to the jurisdiction was properly overruled, and that such action was not error.

The application for continuance by appellant was essentially defective in that the evidence sought could not have been material on the trial of the cause, and because no diligence was shown. The application shows that the absent witness resided in the county of Galveston, and that appellant had caused him to be served with a subpoena by the deputy-sheriff of Brown County about one month before trial. It was requisite under the law that appellant, if he desired this testimony, should apply for and obtain an attachment for the witness; failing in which, he cannot complain of the action of the court in refusing his motion. Pasc. Dig., arts. 2908, 2987.

Appellant proposed to prove by the absent witness, substantially, that he was travelling in the frontier counties of the State, which were exempt by proclamation of the governor from the operation of the act regulating the carrying of arms, and that, on approaching the town of Brownwood, he inquired of some unknown person "whether or not the pistol-law was in force in (this) Brown County," and the reply of said unknown citizen was "that it is not;" that,

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never having seen the proclamation of the governor, and relying upon said information, he wore the pistol openly upon his person, and rode into the town of Brownwood. It may be stated here that testimony to the same effect was admitted at the instance of appellant, and over the objection of the State's counsel, on the trial of the case.

The object of this testimony, as fully disclosed in the record and in the briefs of counsel, was to sustain appellant's defence that he, at the time of carrying the pistol, was laboring under a mistake of fact, and that such mistake did not arise from a want of proper care on his part. Pasc. Dig., arts. 1649, 1650. We cannot concur with counsel in their ingenious presentation of this argument, but are of opinion that if appellant was laboring under any mistake at all, it was a mistake of law, and not of fact. The peculiar provisions of the act of 1871, under which this conviction was had, allows it to become operative or inoperative in counties liable to Indian incursions, at the discretion of the governor. That officer is authorized to designate by proclamation such counties on the border as are liable to such incursions, and upon such designation the provisions of the law became inoperative in those counties. As incursions cease, the same officer is authorized by proclamation to withdraw the exemption, and thereupon the statute becomes operative in the designated county as in other portions of the State. 2 Pasc. Dig., art. 6515; *The State v. Clayton*, 43 Texas, 410.

No distinction is perceived between the existence and operation of the law in a county once exempt from its operation, but which exemption is revoked, and that of any other public law. The citizen is bound at his peril to take notice of the law, and cannot be heard to excuse himself for its violation on the ground of ignorance. As well could he plead ignorance of the provisions of any other public statute in force. The court did not err in overruling appellant's motion for continuance, nor in refusing the instructions asked to the same effect.

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Another question is presented in the supplemental brief of counsel, arising upon recent changes in the law regulating the keeping and bearing of deadly weapons. The provision in the original act of April 12, 1871, authorized persons travelling to keep or carry arms with their baggage. 2 Pasc. Dig., art. 6512. The Revised Penal Code, which took effect since this appeal was taken, provides that the inhibition against carrying arms shall not apply to persons travelling, and fails to prescribe that such persons must carry their arms with their baggage. Rev. Penal Code, art. 319. It is now insisted that as the record discloses that appellant was travelling, within the purview of the law, at the time the pistol was found upon his person, and as the law under which he was convicted is repealed, that the prosecution must abate. It is unquestionably true that if a statute defining an offence and prescribing its punishment is repealed pending a prosecution for that offence, no punishment can be inflicted for its commission, although the act constituting the offence was done at a time when the law defined the offence and prescribed its punishment; and it is equally well settled that such repeal pending proceedings in an appellate tribunal will operate with like effect. *Shepard v. The State*, 1 Texas Ct. App. 522; *Hubbard v. The State*, 2 Texas Ct. App. 506; *Tuton v. The State*, 4 Texas Ct. App. 472; *Halpin v. The State*, 5 Texas Ct. App. 212; *Green v. The State*, 22 Texas, 588; *Wall v. The State*, 18 Texas, 682; *Ex parte McCardle*, 7 Wall. 506.

But the authorities cited, with many others that might be named, are uniform to the effect that, in case of such repeal, offences under the repealed law may still be punished if such has been the declared legislative intention. We are not left to conjecture as to the legislative intention in this matter, as that expression is unmistakable. The new Penal Code, which may be considered a part of the system of Revised Statutes, provides that "no offence committed, and no fine, forfeiture, or penalty incurred under existing laws, previous to the time when this Code takes effect, shall be affected by

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the repeal herein of any such existing laws.” Penal Code, art. 19. And out of abundant precaution it is further provided in the final title of the Revised Statutes, “that no offence committed, and no liability, penalty, or forfeiture, either civil or criminal, incurred prior to the time when any statute, or part thereof, shall be repealed or altered by the Revised Statutes, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offences, liabilities, penalties, or forfeitures shall be instituted and proceeded with in all respects as if such prior statute, or part thereof, had not been repealed or altered, except that, where the mode of procedure or matters of practice have been changed by the Revised Statutes, the procedure had after the Revised Statutes shall have taken effect, in such prosecution or suit, shall be, as far as practicable, in accordance with the Revised Statutes. Rev. Stats. 718, sect. 6.

The judgment is affirmed.

Affirmed.

NED CURRY v. THE STATE.

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1. VERDICT found the defendant “*guilty* as charged in the indictment,” to which no objection was taken until assigned in the motion for a new trial. *Held*, that the verdict is sufficiently intelligible not to be misunderstood, and to preclude all reasonable doubt of its import. Note the distinction taken between this verdict and that in *Taylor v. The State*, 5 Texas Ct. App. 569.
2. SAME — PRACTICE. — Defendant filed a motion for a new trial, and assigned as one cause the insufficiency of the verdict by reason of the defect above indicated; and thereupon the State’s counsel, in explanation of the mistake, filed the affidavit of the juror who wrote the verdict, and who accounts for the mistake as accidental, and because, when the verdict was written, it was so dark he could scarcely see to write. This proceeding is assigned as error. *Held*, that the explanation so given neither impairs the validity of the verdict nor otherwise warrants a disturbance of the conviction.

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APPEAL from the District Court of Smith. Tried below before the Hon. J. C. ROBERTSON.

The indictment and conviction were for assault with intent to murder Henderson Edwards, on November 10, 1878. The second head-note shows the explanation to which reference is made in the latter part of the opinion.

T. W. Jones, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The only ground relied on for a reversal of the judgment of the court below is the defectiveness and uncertainty of the verdict. The verdict as read by the clerk on the coming in of the jury is as follows: "We, the jury, find the defendant guilty as charged in the indictment, and assess the penalty of five years' confinement in the State penitentiary." It seems, however, that the verdict was written by the jury on the back of the indictment, and copied into the minutes of the court; and as there found, instead of the word *guilty* as set out in the verdict as copied above, the word is not *guilty* but "guily;" in other words, in writing the word *guilty* the *t* was omitted. The material inquiry then is, is the verdict as returned into court by the jury, as written on the back of the indictment and transcribed into the minutes of the court, reasonably intelligible; is it certain as to what it speaks?

We are of opinion that the rule cited from *Lindsay v. The State*, 1 Texas Ct. App., in *Taylor v. The State*, 5 Texas Ct. App., on p. 521, applies and is decisive of the question. The rule as there laid down is to this effect: Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work

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injustice. This rule appears to be well founded. See authority in Taylor's case, above cited. In Taylor's case it was said that "when the sense is not clear, when there is doubt of the import of the language used, the verdict, especially in criminal cases, cannot be permitted to stand." The question there being considered was the word "guilty" in the verdict, which was said to be of vital importance to the validity of a conviction, and that the verdict must find the defendant guilty.

We are of opinion, however, that Taylor's case and the one here under consideration are not so precisely similar that the one shall necessarily furnish a rule by which to determine the other. In that case we find the solitary word "guilty," which can hardly be said to have any known signification, whilst in the present case the word "guilty" is followed by the words "as charged in the indictment;" and by separating the syllables so as to place the first four letters in one syllable, and having the *y* alone for the second, and giving to the letter *i* the short sound, the sound so produced would be, if not identical, at any rate nearly so, with the ordinary pronunciation of the word if written "guilty." It does not appear that any notice was taken of the omission of the letter at the time the verdict was returned into court. The first mention made of the subject is in the motion for a new trial, where it is pointed out.

We are of opinion that the verdict is sufficiently intelligible not to be misunderstood, and that there can be no reasonable doubt as to its import, or as to the materiality of the issue, or what issue was found by it; and further, that the explanation given as to how the letter *t* was omitted did not vitiate it, or call for a reversal of the judgment.

Taking this view of the subject, it is not necessary that we should consider the argument of counsel as to the sacredness and inviolability of records. The judgment must be affirmed.

Affirmed.

Statement of the case.

JOHN FRYE v. THE STATE.

1. CONTINUANCE. — Defendant in a murder case sought a continuance to procure proof that the deceased was a violent and dangerous man. The evidence at the trial concurred in showing that, at the time of the homicide, the deceased was making no hostile demonstrations against the defendant. *Held*, that the desired evidence was not material, and no error is apparent in the refusal of the continuance.
2. JURY-LAW. — The act of 1876 known as the jury-law prohibits the summons of talesmen in capital cases within the court-house or yard, if procurable elsewhere; but the fact that a juror was summoned in disregard of this prohibition is not enumerated among the causes for challenge. In the present case the sheriff represented that he could not procure jurors elsewhere; and though defendant's peremptory challenges were not exhausted, he applied none of them to the juror so summoned, but reserved an exception based on the summons in the court-house. *Held*, not cause for a reversal of the judgment, there being nothing impugning the fairness and impartiality of the trial.
3. CHARGE OF THE COURT. — Though always advisable to give in charge to the jury the presumption of innocence in connection with the reasonable doubt, and though a refusal to give the presumption in charge, when asked, is error, yet the mere omission of it, when not asked, is not material error.
4. MEASURE OF PUNISHMENT. — Convicting the defendant of murder in the second degree, the jury assessed his punishment at ninety-nine years' confinement in the penitentiary, which is complained of as oppressive. *Held*, that, subject to the limitations prescribed by law, the measure of the punishment is a matter confided to the jury.

APPEAL from the District Court of Tom Green. Tried below before the Hon. A. BLACKER.

The indictment charged the appellant with the murder of Hubert Speth, on the 18th of May, 1879. The evidence was unusually concise and consistent, there being no controversy respecting the fact of the homicide, nor of the sole agency of the appellant in its commission.

Arthur White, testifying for the State, deposed that on May 20, 1879, he saw Hubert Speth shot and killed by the defendant, Frye, at St. Angelo, in Tom Green County. The deceased and "one of the Storks boys" were walking along the road together, and the defendant and another of

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the Storks boys walking close behind them. "The Storks boy in front," says the witness, "drew his pistol and fired twice up in the air, and I then saw the defendant, John Frye, put a pistol (I don't know where he got it) up behind Speth's head and shoot him. Speth fell as soon as the shot was fired, and defendant then locked arms with the Storks boys and walked on, without stopping to look at Speth." The witness stated that he was about forty or fifty yards from the parties when the deceased was thus killed, about two o'clock in the afternoon. "When Speth was shot, he was doing nothing but walking along."

Dock Storks, for the State, testified that he and Hubert Speth, who was also called Joe Miller, were at St. Angelo, in Tom Green County, one Sunday afternoon in May, 1879. They were walking along together, Speth's right arm in witness's arm, and witness's brother and the defendant walking along behind. Witness was drunk, and pulled out a little pistol and fired it up in the air, and then heard a shot fired from behind, and Speth fell down on his face. "Defendant then came up and locked arms with me, and said to me, 'Dock, I have killed Joe, by G—d; I had to kill him in self-defence.' I was afraid he would kill me. * * * At the time Hubert Speth was killed, he was doing nothing at all but walking along."

Other witnesses, who observed the deed from a short distance, gave a similar account of it, and the defendant repeatedly spoke of it in a boastful manner, though warned that his statements might be used against him. There was some evidence of a slight difficulty between the defendant and the deceased the day before the homicide.

All other facts of any significance appear in the opinion.

A. P. Tugwell and *D. Y. Portis*, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was indicted for the murder of one Hubert Speth, *alias* Joe Miller, alleged to have

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been committed in Tom Green County on May 18, 1879. An application for a continuance was made and overruled. The record recites that on the arraignment of the defendant, and after the indictment had been read to him, upon his being asked if he was guilty or not guilty, he "answered 'guilty,' which plea was not received by the court." The record further shows that he was tried on a plea of not guilty, found guilty by the jury of murder in the second degree, and his punishment assessed at confinement in the State penitentiary for the period of ninety-nine years; and judgment was entered accordingly. A motion for a new trial was overruled, and sentence pronounced in accordance with the verdict and judgment.

The errors assigned and reserved by bill of exceptions are, *first*, the refusal to continue the case on the application made by the defendant; and, *secondly*, because two witnesses averred to be material, and who had obeyed a subpoena every day, were not present in court when the case was called for trial, when an attachment was called for, and the defendant was forced to trial before the attachment was returned; *third*, that one of the jurors was summoned in the court-house, and after hearing the plea of the defendant on arraignment; and, *fourth*, that the court erred in admitting in evidence certain confessions made by the defendant at a time when, it is claimed, he was under arrest and in duress.

The presiding judge appends to the bill of exceptions the following: "I sign the foregoing bill of exceptions with the explanation that no application was made for continuance on the ground of the absence of J. M. Morris and J. Storks, and that they were material witnesses on the trial of this cause. An application was made and sworn to, and, when presented for the action of the court, the two first grounds were alone considered, as the witnesses named in the application were present, and to that extent was withdrawn by defendant's counsel. The defendant's counsel applied for attachments for said Morris and Storks on the morning of the day of the

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trial, which were issued, and the trial postponed until the afternoon of said day, when the trial proceeded. It not appearing to the court that Morris and Storks were material witnesses, the court declined to delay the trial for the return of the attachments. G. W. Delong was summoned by the sheriff in the court-house, and stated that he could not find jurors elsewhere; the defendant, although his peremptory challenges were not exhausted, did not challenge said Delong. The court is satisfied that the panel for the trial of said cause could not have been filled without unreasonable delay, except by summoning said G. W. Delong on said jury."

Turning to the application for a continuance alluded to in the first paragraph of the bill of exceptions, we find that it embraces two grounds: *first*, that the affiant expected to procure documentary evidence from St. Louis, Missouri, that the person he is charged with having wounded was a refugee from justice, being indicted in the latter city for the crime of murder, and was a man of violent and dangerous character; *second*, that he expected to procure testimony that the person for whose murder he is indicted had made a violent assault upon one Price, and fired three shots at him without provocation, and was known in Coleman County as a violent and dangerous man. It is enough to say, with reference to this exception, that the testimony for which a continuance was asked could only have availed the defendant on a question of self-defence, and in looking at the case as presented by the record we see no room for the plea of self-defence to be interposed. So far as the testimony goes, the deceased was not making or attempting to make any demonstration against the life or the person of the defendant, or endeavoring to injure his person in any manner, either before or at the time the fatal shot was fired, nor is there any evidence of a threat even to do so; so that we fail to discover any injury to the rights of the appellant by the ruling in question. The several matters set out in

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the other clauses of the bill of exceptions are fully explained by the remarks of the judge appended thereto, by which the correctness of the ruling is fully vindicated, and from which it appears that no legal right of the accused was prejudiced.

With reference to the juror alleged to have been summoned in the court-house, it is sufficient to say that, as shown by the statement of the judge, the appellant did not challenge him, and his peremptory challenges had not been exhausted. In considering a similar question, in that a juror had been summoned in violation of the jury-law of 1876, this court said, in *Matthews v. The State*, 6 Texas Ct. App. 23: "This objection not being found among the causes for challenge enumerated in the statute, we are inclined to the opinion that it would be regarded as directory, unless it should be shown that a contrary rule would tend to deprive one accused of crime of a fair and impartial trial." Even the fact that one who is not a competent juror had sat upon the jury would not be ground sufficient to grant a new trial or reverse a judgment on appeal, if the fact could have been discovered when the jury was empanelled, by the use of proper diligence. *Roseborough v. The State*, 43 Texas, 570; *O'Mealy v. The State*, 1 Texas Ct. App. 180; and *Matthews v. The State*, above cited.

It is urged in the brief for the appellant that the charge of the court was defective in that it did not charge the presumption of innocence. We had occasion to consider this precise question, and to review the authorities accessible, at the present term of the court, in the case of *Hutto v. The State*, ante, p. 44. It was then said: "With regard to the presumption of innocence, while it has ever been held a ground of reversal where the court has refused to give it when properly asked, and whilst it is generally agreed that it would always be better for the court to give it in charge, in connection with the reasonable doubt, in the language of the statute, * * * yet we know of no case in our own

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or other States which has gone to the extent of reversing a judgment for the want of such an instruction, when it was not expressly asked and refused." See Hutto's case for authorities. Following the rule as there laid down, we cannot regard the failure to charge the presumption of innocence as ground to reverse the judgment. If the charge had been asked and refused, the case would perhaps be different.

It is urged in argument that the punishment is oppressive, and that the testimony would have warranted milder punishment. It is the business of the court to see that the testimony is sufficient to warrant the verdict, but, so that the punishment imposed is within the limit fixed by law, the jury must grade the amount.

Having carefully considered the case as made by the record, in the light of the brief of appellant's counsel, we fail to discover any such error committed on the trial as would warrant an interference with the verdict and judgment. The judgment is affirmed.

Affirmed.

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W. S. MAGEE v. THE STATE.

RECOGNIZANCE for an appeal described the offence as "disturbing a congregation assembled for religious worship." *Held*, bad, because the disturbance is not characterized as having been wilfully done, and therefore the recital imports no offence against the law.

APPEAL from the County Court of Rains. Tried below before the Hon. E. P. KEARBY, County Judge.

Darden & Martin, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The assistant attorney-general, on behalf of the appellee, moves the court to dismiss the appeal

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herein, because of an insufficient recognizance. The offence charged against the appellee is wilfully disturbing a congregation assembled for religious worship, and conducting themselves in a lawful manner, by loud and vociferous talking. The offence set out in the recognizance is, “disturbing a congregation assembled for religious worship.” The material defect in the recognizance is in not characterizing the disturbance as having been *wilfully* done. Penal Code, art. 180; Acts 1873, p. 43.

Because the recognizance does not describe the offence as defined by law, or any offence known to the law, the motion of the assistant attorney-general must prevail, and the appeal herein be dismissed. *Stancel v. The State*, 6 Texas Ct. App. 461. And it is so ordered.

Appeal dismissed.

A. McMILLAN v. THE STATE.

1. PRACTICE IN THE COURT OF APPEALS. — The refusal of a continuance will not be revised on appeal, unless a proper bill of exceptions was reserved.
2. VERDICTS are to have a reasonable intendment and construction, and are not to be avoided unless from necessity originating in doubt of their import, immateriality of the issue, or manifest tendency to injustice.
3. SAME. — Misspelling does not vitiate a verdict, when no doubt can be entertained as to the words intended, or as to their meaning. Note in the opinion a strong illustration of this rule.
4. CHARGE OF THE COURT. — Not error to omit instructions on degrees in the weight of evidence, whether direct or circumstantial, unless some part of the evidence be within the defined exceptions to the general rule, — as, for instance, the testimony of an accomplice.

APPEAL from the District Court of Bell. Tried below before the Hon. L. C. ALEXANDER.

The facts germane to the rulings are stated in the opinion.

No brief for the appellant.

Opinion of the court.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. This appeal is from a judgment of conviction of theft of a gelding. In the absence of brief or oral argument on behalf of the appellant, and there being no bills of exception to any action or ruling of the court below, we cannot perhaps better reach whatever of merit the case presents than by considering the several grounds set out in the defendant's motion for a new trial.

1. The first two grounds of the motion call in question the sufficiency of the testimony to support the verdict. On an examination of the facts as stated by the witnesses, we are of a different opinion.

2. The substance of the third ground of the motion is that the court erred in overruling an application for a continuance made by the defendant. The ruling of the court on the application was not properly reserved for revision on appeal. Questions of this character will not be considered here except on a proper bill of exceptions prepared in the manner prescribed by law and embodied in the record. This is a settled rule of practice. *Blankenship v. The State*, 5 Texas Ct. App. 218, and authorities there cited.

3. The fourth ground of the motion calls in question the sufficiency and certainty of the verdict. The precise objection to the verdict appears to be that it does not find the defendant guilty. The verdict as set out in the judgment-entry is in the following language: "We, the jury, find the *defendend* guilty, and assess his punishment at five years *confindendment* in the *penitentiary*." It cannot be claimed that the verdict as written is a good specimen of orthography. Still we are of the opinion that there can be no serious doubt as to its import, or what the jury intended by it, notwithstanding the word "defendant" is written *defendend*, and the word "confinement" is written *confindendment*, and the word "penitentiary," *penitentiary*; and whilst the misspelled words may not be any

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words known to the language, yet when considered with reference to the context their meaning cannot well be misunderstood. *Koontz v. The State*, 41 Texas, 570; *Krebs v. The State*, 3 Texas Ct. App. 248. Verdicts are to have a reasonable intendment and to have a reasonable construction, and are not to be avoided unless from necessity originating in doubt of their import, or immateriality of the issue found; or their manifest tendency to work injustice. *Lindsay v. The State*, 1 Texas Ct. App. 327, citing Gra. & Wat. on New Tr. 159, and other authorities.

4. The remaining ground is to the effect that the court erred in the second clause of its charge to the jury. The objection to the charge is not apparent, and no precise objection is pointed out by bill of exceptions, or by additional instructions asked by the defendant. In fact, it is conceded by the motion for a new trial that the charge, abstractly considered, is the law "touching the propositions of which it treats;" yet it is urged that it was not applicable to the facts in evidence. If it was supposed to trench upon the province of the jury as being on the weight of evidence, it was the duty of the defendant's counsel to ask additional instructions on the subject. *Parish v. The State*, 45 Texas, 51. We fail to discover any error of which the appellant can justly complain in overruling the motion for a new trial. The assignments of error cover, in the main, the same grounds as the motion for a new trial.

One supposed error, in addition, has been assigned as follows: "The court erred in not calling the attention of the jury, in its charge, to the distinction between positive and circumstantial testimony, as all the testimony in the case was purely circumstantial." We are of opinion the correct rule was laid down, substantially, in *Chester v. The State*, 1 Texas Ct. App. 707, to this effect: "Whilst it is true that in cases dependent on circumstantial evidence alone a jury should not convict a defendant unless the facts are not only consistent with the guilt of the defendant, but

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incapable of explanation upon any other hypothesis than that of his guilt, yet, as the jury are the sole judges of the weight of the testimony, whether it be positive or circumstantial, it cannot be properly said to be an error for the court to refuse to charge the jury upon legal presumptions and degrees of weight in testimony, unless some part of the testimony comes within the defined exceptions to the general rule, such as that 'a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offence committed.' "

We fail to discover any error on account of which the verdict and judgment should be disturbed.

Affirmed.

C. JONES v. THE STATE.

1. **PRACTICE.** — A witness, having testified about a bill of sale, was tendered by counsel a paper for identification. Opposing counsel objected on the ground that they were entitled to an inspection of the paper before it was passed to the witness, and were assured by the court that they should have an opportunity to inspect it before it should be admitted, which opportunity was subsequently afforded them when the paper was offered in evidence. *Held*, that the assurance given by the court should have been satisfactory, and no error or prejudice is apparent.
2. **SAME.** — A witness for the defence having mentioned certain persons as present at the horse-trade, the prosecution was allowed in cross-examination to ask him where they were when he last heard of them. *Held*, allowable in view of the latitude accorded on cross-examination.
3. **VERDICT.** — A jury brought in a verdict of conviction in which the punishment was assessed "at ten years in the penitentiary." The court, deeming the verdict informal in not providing for the *confinement* of the defendant in the penitentiary, informed counsel that with their consent the jury would be remanded to enable them to amend their verdict in that respect; to which the State's counsel assented, and defendant's replied that the court could act as it thought proper. The jury, being sent back, returned with a verdict amended in the particular mentioned, and the defence filed a general exception. *Held*, that the reply of the defendant's counsel was virtually an assent; that the verdict as first brought in was good; and that the action of the court was authorized by the Code.

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APPEAL from the District Court of Parker. Tried below before the Hon. A. J. HOOD.

The opinion discloses the facts germane to the rulings.

McCall & McCall, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. Notwithstanding a vigorous defence in the District Court, the defendant, appellant here, was convicted of theft of a gelding, and his punishment assessed at confinement in the State penitentiary for a term of ten years. Judgment was entered in accordance with the verdict; a motion for a new trial was made, and being overruled this appeal is prosecuted.

Four bills of exception were taken to rulings of the court during the progress of the trial. Noticing the matters raised by these bills of exception so far as deemed material, in their numerical order, we gather from the first that a witness for the prosecution, being on the witness-stand, was handed a paper for identification, when the counsel for the defendant insisted it should first be submitted to them for inspection. The bill of exceptions recites that the court informed the counsel that if the State's counsel offered the paper in evidence the court would see to it that the defendant's counsel did have an opportunity to inspect it before it was admitted in evidence, and permitted the witness to answer. He had been handed a paper, and asked to examine it and then state whether or not that (the paper handed the witness) was the bill of sale which the witness had stated he received from the defendant. We fail to see, when an attempt was made to identify the paper, that the defendant's counsel had any concern with it further than to see that it was properly admissible in evidence, and we are of opinion that the assurance of the court should have been satisfactory.

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But however this may be, it seems that all difficulty was obviated as set forth in the following explanation of the judge in giving the bill of exceptions, which sufficiently indicates the fairness of the action of the court. The judge says: "It is deemed proper, in explanation of the above bill of exceptions, to state that in point of fact, before the bill of sale was read, or offered to be read, to the jury, the State's counsel did hand to defendant's counsel, for examination, the bill of sale." There was no question raised as to the competency or admissibility of the evidence, but only as to the manner and means of its identification and the manner of getting it to the jury. No legal right of the accused was infringed, that we see.

Bill of exceptions No. 2 shows in effect that when a witness for the defendant was on the stand, and being cross-examined by the State's counsel, the witness having testified on his direct examination that one Scott and one Swain were present at a certain time and place, and, together with the witness on the stand, had witnessed a certain horse-trade between one Airhart and one Johnson, the State's counsel asked the witness, on cross-examination, "Where were said Scott and Swain when you last heard of them?" The question was objected to, and the objection overruled, and the witness was permitted to answer the question. We are of opinion that the court did not transcend the latitude allowed in the cross-examination of a witness. Greenl. on Ev., sect. 445 *et seq.*

The materiality of the testimony sought to be elicited from the witness, as set out in bill of exceptions No. 3, is not seen, nor is the supposed error made manifest by the record. In bill of exceptions No. 4 a supposed irregularity in returning the verdict of the jury is complained of. It seems that the verdict was returned by the jury in this form: "We, the jury, find the defendant guilty, and assess his punishment at ten years in the penitentiary." It is shown in this connection that the judge, after looking at the

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verdict, but without reading it aloud, stated to the counsel for the State and the defendant, then being present, that there was no mistaking the intention of the jury as disclosed by their verdict, but that it occurred to the court that the verdict was not altogether as formal as it ought to be, and that the court would direct the jury's attention to the informality if counsel on both sides were willing. Counsel for the State gave his consent, and the counsel for the defendant made answer that the court could act in the matter as the court thought proper. Thereupon the court told the jury that if they intended to find against the defendant "confinement," they ought to use that word in their verdict; and at the same time handed the written verdict back to the foreman, and told the jury to retire to their room and make out their verdict in proper form. The jury retired accordingly, and afterwards returned their verdict; and to this the counsel for the defendant took a bill of exceptions.

The judgment ought not to be reversed because of the matters complained of in this bill of exceptions, for several reasons. In the first place, when it was first proposed to send the jury to their room to put the verdict in form, the action was virtually assented to by the defendant's counsel by his telling the judge he could use his pleasure in the matter. In the next place, the verdict was sufficient as it was first brought into court by the jury; and in the next place, the action taken was permitted by art. 696, Revised Code of Criminal Procedure, which but reenacts the former law.

The record discloses that, after the judge had delivered his general charge to the jury, counsel for the defendant asked the court to give several special instructions to the jury, and among them one charge on the conclusiveness of circumstantial testimony necessary to warrant conviction. We are of opinion the case was one rather of a conflict of testimony than one depending solely on circumstantial

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evidence. The judge, in refusing to give the special instructions, makes the following explanation of his action: "The above and foregoing charges are refused, it being the opinion of the court that the main charge contains all the law applicable to the case." And in this opinion of the judge we concur. At any rate, we do not find any such failure to charge the law of the case as would affect the judgment. On the subject of a charge on circumstantial evidence, see *McMillan v. The State*, ante, p. 100, decided to-day.

We find no such error as would warrant us in setting aside the verdict and judgment. The judgment of the District Court is affirmed.

Affirmed.

JOHN HASKEW v. THE STATE.

CHARGE OF THE COURT. — In a trial for unlawfully carrying a pistol, the evidence for the State consisted in the testimony of two witnesses, to the effect that they saw on the defendant "what they took to be the handle of a pistol." Two witnesses for the defence testified that they saw nothing of the kind, and that, their opportunities being as good as those of any one, they would have been likely to see it if upon the defendant. The court instructed the jury, in effect, that, with equal opportunities, the testimony of an affirmative witness was preferable to that of one who failed to observe the fact in question. *Held*, that the instruction was on the weight of evidence; and, being excepted to at the time, was material error in view of the state of the proof.

APPEAL from the County Court of Johnson. Tried below before the Hon. H. W. BARCLAY, County Judge.

The opinion clearly states the case.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The character of the evidence as disclosed by the statement of facts in the record made it of peculiar

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importance that the court, in its charge, should adhere strictly to established statutory principles. Two witnesses for the State have testified to the effect that, at the time charged in the indictment, they saw what they took to be the handle of a pistol on the person of appellant. Neither of them testified positively to the fact that it was a pistol. Appellant introduced two other witnesses, who seem from the record to have been in close proximity to him at the time of the difficulty, and they testified that they saw nothing upon the person of appellant resembling a pistol, or the handle thereof; and both were of opinion that, had appellant had a pistol on his person at the time, it could hardly have escaped their observation.

The court instructed the jury, among other things, that "the testimony of a witness who swears positively to a fact is to be taken in preference to the testimony of one who cannot so testify, though having the same opportunity of knowing." This charge, being excepted to at the time as upon the weight of evidence, and assigned as error, requires a reversal of the judgment. *Pasc. Dig.*, arts. 3059, 3067; *Morrison v. The State*, 41 Texas, 516; *Bishop v. The State*, 43 Texas, 390; *Rice v. The State*, 3 Texas Ct. App. 451.

No objection is perceived to the indictment, and the County Court of Johnson County had jurisdiction of the offence charged. *Woodward v. The State*, 5 Texas Ct. App. 296; *Leatherwood v. The State*, 6 Texas Ct. App. 244.

The other errors assigned are not likely to arise on another trial. For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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JOHN IRVIN v. THE STATE.

1. **INFORMATIONS.** — No standard of penmanship has been prescribed for indictments or informations; and as the supporting affidavit is a fundamental part of an information, reference to it is legitimate to solve a doubt arising from the conformation of a letter in the information.
2. **CHARGE OF THE COURT ON CIRCUMSTANTIAL EVIDENCE.** — In a misdemeanor case the court instructed the jury that, “to justify a conviction when the proof of any one of the issues depends upon circumstances proved to exist, the circumstances proven must be incapable of explanation upon every other reasonable hypothesis than that of the defendant’s guilt.” *Held*, correct in principle, and sufficient in the present case on the subject.
3. **SAME.** — It was not error to refuse a requested instruction which was predicated on the erroneous assumption that the State’s evidence was entirely circumstantial, and which directed the jury to acquit unless the defendant’s guilt had been so demonstrated as to exclude every possibility of his innocence. See the opinion *in extenso* on the latter point.

APPEAL from the County Court of Johnson. Tried below before the Hon. W. J. EWING, County Judge.

All material facts appear in the opinion.

No brief for the appellant has reached the reporters.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. In this case, as in the case of William Irvin, decided a few days ago, the original affidavit and information on file in the lower court have been sent up for inspection, in order that we might be better enabled to determine one of the grounds made in the motion to quash. It was not made so pointedly in the former case as we here find it in the third subdivision of the motion, in words following: “Because the same fails to allege that the defendant did kill said swine, but instead of the word “kill,” the word “Rill” is used.

As was said by this court in *Witten v. The State*, 4 Texas Ct. App. 70, “it has been held time and again that

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bad spelling will not vitiate an indictment (nor information), and we can perceive no good reason why bad or awkward writing should. The Legislature has not, in providing the requisites for an indictment (or information), established a standard of penmanship in which it must be prepared, as one of the number.”

No one can possibly be misled in this instance as to the letter the pleader was trying to make, and in so trifling a matter, if there should a doubt arise, we would look to the affidavit or complaint accompanying the information to aid us in its solution; for in misdemeanors the affidavit or complaint is required to be filed with and is part of the information,—a fundamental part. The information is based upon and must be characterized by it. Gen. Laws 15th Leg. p. 20; Pasc. Dig., art. 2871; Rev. Stats., Code Cr. Proc., arts. 430, 431; *Davis v. The State*, 2 Texas Ct. App. 184; *Johnson v. The State*, 4 Texas Ct. App. 594; *Casey v. The State*, 5 Texas Ct. App. 462.

An inspection of the original complaint, which is also before us, will, we think, satisfy the most skeptical and hypercritical that the letter is a “K” and not an “R.” See also *Hutto v. The State*, decided at the present term, *ante*, p. 44.

No error was committed by the court in overruling the motion to quash. See *W. Irvin v. The State*, decided at the present term, *ante*, p. 78.

But it is contended that the evidence does not support the verdict, because it leaves the main fact necessary to be ascertained in doubt and uncertainty, to wit: whether the hog alleged to have been wilfully and wantonly killed by defendant died, in fact, of the gunshot wound inflicted by defendant, or was drowned in the water of the slough where its dead body was found by the owner.

The special instructions asked by defendant and refused by the court assume as a postulate that the evidence of the prosecution was entirely circumstantial in character. Such

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is not the case. The witness Whitiker says: "On or about the 12th of August, A. D. 1878, I was in the defendant's field and saw him shoot a black hog. At the time I saw him shoot the hog I was standing off about fifty yards from the corn, and about one hundred and fifty yards from the defendant; defendant was out in the corn one hundred yards. After the hog was shot, I followed it out of the field and across the slough, and over on the island between the slough and the river, and there I found the hog lying on the ground in a low condition. He had been shot behind the shoulders, with a small rifle. I put my foot on him and he did not say anything, for he was speechless. The hog was A. J. Pierce's, and would weigh about 240 lbs."

A. J. Pierce, the owner, testified that on the 15th or 16th of August he found a black hog of his, dead, back of defendant's cornfield, in the mud and water of the slough; it was swelled up, — looked like it had been dead for a day or two. He did not pull it out of the water; did not examine to see whether it had been shot or not, and did not know what caused its death.

Amongst other things, in a very appropriate charge, the court instructed the jury that, "to justify a conviction when the proof of any one of the issues depends upon circumstances proved to exist, the circumstances proven must be incapable of explanation upon every other reasonable hypothesis than that of defendant's guilt."

Defendant's fifth special instruction, which was refused by the court, as indeed were all his instructions, was in these words: "You are further instructed that where a party is on trial for killing a swine, and it is proved that the swine was shot, but not instantly killed, and the same hog is afterwards found dead in water or in a river, before a jury could convict they should be satisfied from the evidence that the swine died from the effect of the shot, and not from the effect of the water; and you are instructed in this case that if you find from the evidence that defendant shot the hog,

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and that the shot did not instantly kill the swine, and that the same was afterwards found in the water of the river, dead, before you can find him guilty you must believe from the evidence, beyond a reasonable doubt, that the hog so found dead died from the immediate effect of the shot, and not from the effect of the water. The fact that the shot was the remote cause, and the water the immediate effect of the death of the hog, would not justify a verdict of guilty; but you must find that the shot was the immediate and direct cause of the death, otherwise you will find defendant not guilty.”

The evidence did not require or warrant such a charge. When the hog was shot by defendant, as stated by Whitiker, the water in the slough was low, and the hog waded it to the other bank, where Whitiker saw and left him “*in articulo mortis*,” as we have every reason to presume. When Pierce saw the hog, the waters in the slough and river were up, and, for aught that appears, the animal may have remained on the same spot where Whitiker left it, and yet been in water when Pierce saw it. But whether this presumption is correct or not, the instruction was obnoxious in that it submitted an issue which was not fairly raised by the evidence, and which it might have been impossible, in the nature of things ordinarily, either to prove or disprove by positive evidence.

“To say that the proof in any case must show the innocence of the accused ‘to be impossible,’ would necessarily be to say that it must demonstrate his guilt, since nothing short of such demonstration could exclude the possibility of innocence. * * * The degree of certainty upon which the jury are justified in convicting, termed moral certainty, does not amount to demonstrative certainty of guilt, or certainty which necessarily excludes the possibility of innocence; on the contrary, it supposes and entirely consists with the possibility of innocence, and it is itself nothing more than the comparatively measurable, limited degree of

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certainty 'that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it, — a certainty of the guilt of the prisoner, not indeed beyond all possible or imaginary doubt, but beyond all reasonable doubt.' " *The People v. Brotherton*, 47 Cal. 388.

In the first section of his great work on Evidence, Mr. Greenleaf says: "In the ordinary affairs of life, we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them. The *true question*, therefore, in trials of fact, is not whether it is possible that the testimony may be false, but whether there is *sufficient probability* of its truth; that is, whether the facts are shown by competent and satisfactory evidence. Things established by satisfactory and competent evidence are said to be *proved*." 1 Greenl. on Ev., sect. 1.

The court did not err in refusing to give the special instructions, and in the paragraph of the charge given as quoted above on circumstantial evidence instructed the jury in conformity with established precedent. 3 Greenl. on Ev. sect. 29; *Williams v. The State*, 41 Texas, 209; *Rodriguez v. The State*, 5 Texas Ct. App. 256.

There is no error in the record, and we are of opinion the judgment should be affirmed.

Affirmed.

J. T. McDONALD v. THE STATE

1. PRACTICE IN COUNTY COURT. — If, in a case transferred to the County Court from the District Court, no sufficient certified copy of the proceedings in the District Court appears, it is competent to supply the defects in the certified copy, or to obtain a new and sufficient one.

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2. SAME — *Quære*, whether a plea to the jurisdiction of the County Court, instead of a motion to quash, is not the proper practice for the defence in such cases.

APPEAL from the County Court of Johnson. Tried below before the Hon. W. J. EWING, County Judge.

This was a case of aggravated assault and battery. The opinion shows the defect in certificate of the district clerk.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. Our statute provides that, “at the end of each term of the District Court of each county in this State, the district judge shall make an order transferring all criminal cases over which the District Court has no jurisdiction, to the several courts in the county having jurisdiction over the respective cases, and shall state in his order the causes transferred, and to what court they are transferred.” Acts 1876, p. 135, sect. 1; Rev. Code Cr. Proc., art. 435.

“It shall be the duty of the clerk of the District Court, without delay, to deliver the indictments in all cases transferred, together with all the papers relating to each case, to the proper court or justice of the peace, as directed in the order of transfer; *and he shall accompany each case with a certified copy of all the proceedings taken therein in the District Court*, and also with a bill of the costs that have accrued therein in the District Court, and the said costs shall be collected in the court in which said cause is tried, in the same manner as other costs are collected in criminal cases.” Acts. 1876, p. 135, sect. 2; Rev. Code Cr. Proc., art. 437.

The certificate of the district clerk, in transferring this case to the County Court, after setting out, we presume, all the proceedings in the District Court, is as follows: “The State of Texas, county of Johnson. I, John B. Hudson,

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clerk of the District Court of Johnson County, Texas, hereby certify that in our said court in the cause herein stated, and of all costs incurred in same, and that all the papers on file in our said court are herewith transferred. Witness, John B. Hudson, clerk of the District Court of Johnson County, Texas. Given under my hand and seal of office," etc.

It will be noticed that the clerk does not certify that the entries and orders which he had copied were copies "of all the proceedings taken therein in the District Court." This he should have done, to have brought his certificate within the requirements of the statute.

A motion to quash the indictment was made in the County Court, the first ground of which was, "because said indictment has never been transferred from the District Court of Johnson County to this, the County Court of said county, as the law directs and requires; for that no certificate of the clerk of the said District Court, showing the action of the District Court in regard to said indictment, has ever been filed with the papers in this cause, as the law requires."

This motion, coming as it did *in limine*, when the defect in the certificate might have been amended or a new certificate given by the district clerk, should have prevailed, according to previous decisions in *Walker v. The State*, decided at the present term, *ante*, p. 52, and *Denton v. The State*, 3 Texas Ct. App. 635; and the court erred, it appears, in overruling the motion so far as this particular ground was concerned. But *quære*, should not the point have been made by plea to the jurisdiction, instead of by motion to quash?

We feel less hesitancy in reversing this case upon the technical error discussed, because in our opinion the court, under the peculiar circumstances shown by the evidence, should have granted defendant a new trial for the newly discovered evidence of the witness McClure.

The judgment is reversed and the cause remanded.

Reversed and remanded.

L. EDMONDSON v. THE STATE.

PRACTICE. — At the instance of the jury a witness may, by direction of the court, be recalled and required to restate his former testimony on the particular point of disagreement; but to allow a witness, when thus recalled, to make statements additional to his previous testimony is in contravention of both the letter and the spirit of the provision of the Code which controls the subject.

APPEAL from the County Court of Lamar. Tried below before the Hon. S. C. BRYSON, County Judge.

The appellant was charged, by information, with the misdemeanor of unlawfully pulling down a fence without consent of the owner. The jury assessed against him a fine of \$10.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, J. After the case had been submitted to them, the jury returned into court and announced that they were unable to agree upon the facts, and wished the witness Q. R. Thompson recalled, that he might restate his evidence "about where one piece of fence was pulled down, with reference to a diagram showing two lines west of the defendant's house." A bill of exceptions, which is signed and certified to by the judge as correct, states that the witness was recalled, and rehearsed his former statement; and the jury being still unsatisfied, the court permitted two of them "to question the witness, and permitted the witness to answer, detailing matters not detailed before that time, * * * and added thereto, in answer to a question propounded by Jesse Caviness, a juror, a positive declaration as to his mother's fence, calculated to remove the doubts of jurors," etc.

Now, our statute is that, "if the jury disagree as to the statement of any particular witness, they may, upon apply-

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ing to the court, have such witness again brought upon the stand, and he shall be directed by the judge to detail his testimony in respect to the particular point of disagreement, and no other; and he shall be further instructed to make his statement in the language used upon his examination, as nearly as he can." Pasc. Dig., art. 3080; Rev. Stats., Code Cr. Proc., art. 697.

In *Campbell v. The State*, 42 Texas, 591, our Supreme Court say, with reference to this statute: "We certainly are not prepared to hold that every departure from the strict letter of this article will require a reversal of the judgment. On the other hand, we are as unwilling to say that in no case will the failure of the court below to obey the behest of a directory statute warrant a reversal."

And in *Tarver v. The State*, 43 Texas, 564, it is said: "We are not authorized to say that such a departure from the requirement of the law, and in permitting the witness to make a further and additional statement from that made on the trial, may not have been prejudicial to the rights of the appellant."

Because it appears that the procedure in this case, with regard to the so-called witness, was in contravention of the plain letter and spirit of the law, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

W. HOBBS AND S. HARRIS v. THE STATE.

1. CHARGE OF THE COURT IN MISDEMEANORS. — Note in the opinion the collocation of the provisions of the Code respecting the charge of the court, with especial reference to misdemeanor cases.
2. SAME. — In misdemeanor cases, the Code expressly provides that "the court is not required to charge the jury, except at the request of counsel on either side," and it contemplates that counsel, when they prefer such a request, shall present to the court, in writing, the charge desired. If the requested

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charge be not so presented, the court is not bound to give the jury any written charge in misdemeanor cases.

3. **SAME.** — And if the court, in a trial for misdemeanor, gives in writing an erroneous charge, it is not cause for reversal on appeal unless exception was duly reserved at the time.
4. **PRACTICE.** — If the court, in a misdemeanor case, desires, without giving a written charge, to apprise the jury of the definition and punishment of the offence, this may be done by reading to them from the Code such provisions as are necessary for the purpose. *Carr v. The State*, 41 Texas, 546, overruled on this point.

APPEAL from the County Court of Hunt. Tried below before the Hon. H. B. SIMONDS, County Judge.

The conviction was for petit theft.

Jones & Lewis, for the appellants.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Errors assigned in this case, and relied upon in the brief of counsel for appellants as grounds for reversal, may be summed up in the two propositions, viz. :—

1. That the court erred in its charge to the jury.
2. The court erred in overruling the motion of defendant Harris for a new trial.

The prosecution was under an indictment for a misdemeanor, which was regularly transferred to the County Court, and the trial and conviction of the appellants was had in the County Court.

With regard to the first supposed error, — the charge of the court, — an inspection of the record shows that it was not excepted to at the time, and a bill of exceptions reserved; nor were any additional instructions asked in behalf of defendants. The supposed error in the charge was for the first time called to the attention of the court in the motion for a new trial. It is insisted here that the charge is radically erroneous, and that we should reverse the case upon that ground. Previous decisions of this court have,

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it seems, failed to impress upon the courts and bar throughout the State the opinion and views entertained by us with regard to the proper construction to be placed upon the statutes and the rules which will govern and control us in passing upon questions raised about the charges of courts in misdemeanor cases. *Foster v. The State*, 1 Texas Ct. App. 363; *Killman v. The State*, 2 Texas Ct. App. 222; *Goode v. The State*, 2 Texas Ct. App. 520; *Campbell v. The State*, 3 Texas Ct. App. 33; *Forrest v. The State*, 3 Texas Ct. App. 232; *Work v. The State*, 3 Texas Ct. App. 233; *Jordan v. The State*, 5 Texas Ct. App. 422; *Trippett v. The State*, 5 Texas Ct. App. 595. We propose to restate the rules of procedure in misdemeanors, so far as the charge is concerned, and the proper interpretation of the statutes embracing them.

In our Code of Criminal Procedure we find eight articles relating to the charge, which are as follows:—

Pasc. Dig., art. 3059. “After the argument of any criminal cause has been concluded, the judge shall deliver to the jury a written charge in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony, whether asked or not.” Rev. Stats., Code Cr. Proc., art. 677.

Pasc. Dig., art. 3060. “It is beyond the province of a judge sitting in criminal causes to discuss the facts, or use any argument in his charge calculated to rouse the sympathy or excite the passion of the jury. It is his duty to state plainly the law of the case.” Rev. Stats., Code Cr. Proc., art. 678.

Pasc. Dig., art. 3061. “After or before the charge of the court to the jury, the counsel on both sides may present written instructions, and ask that they be given to the jury. The court shall either give or refuse these charges, with or without modification, and certify thereto; and when the

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court shall modify a charge, it shall be done in writing, and in such manner as to clearly show what the modification is." Rev. Stats., Code Cr. Proc., art. 679.

Pasc. Dig., art. 3062. "The general charge given by the court, as well as those given or refused at the request of either party, shall be certified by the judge, and in case of appeal constitute a part of the record of the cause." Rev. Stats., Code Cr. Proc., art. 680.

Pasc. Dig., art. 3063. "In criminal actions for misdemeanor the court is not required to charge the jury except at the request of counsel on either side; but when so requested, shall give or refuse such charges, with or without modification, as are asked in writing." Rev. Stats., Code Cr. Proc., art. 681.

Pasc. Dig., art. 3064. "No verbal charge shall be given in any case whatever, except in cases of misdemeanor; and then only by consent of parties." Rev. Stats., Code Cr. Proc., art. 682.

Pasc. Dig., art. 3065. "When charges are asked, the judge shall read to the jury only such as he gives." Rev. Stats., Code Cr. Proc., art. 683.

"The jury may take with them in their retirement the charges given by the court, after the same have been filed; but they shall not be permitted to take with them any charge, or portion of a charge, that has been asked of the court and which the court has refused to give." Rev. Stats., Code Cr. Proc., art. 684.

"Whenever it appears by the record in any criminal action, upon appeal of defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall be reversed, *provided the error is excepted to at the time of the trial.*" Rev. Stats., Code Cr. Proc., art. 685.

So much for the law as it is actually written. It really seems to us so plain that there is no room for construction. In felony cases, a written charge setting forth the law appli-

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cable to the facts must be given, "whether asked or not." This expression "whether asked or not" shows plainly that there is a character of cases not felonies, in which *a written charge is only given when asked*. Rev. Stats., Code Cr. Proc., art. 677. Such cases are misdemeanors; and as to such cases the statute expressly says "the court is not required to charge the jury [at all] except at the request of counsel on either side." How is the court to be requested by counsel to give a charge? Evidently the statute contemplates that the charges shall be written out by the counsel, and then handed to the court with the request that the court will give them. And even when requested, if the request is not accompanied by the written charge prepared by counsel, the court is not bound to give a written charge in misdemeanors. The counsel must write out and present the charge; and it then becomes the duty of the court to "give or refuse such charges, with or without modification, as are asked in writing." Rev. Stats., Code Cr. Proc., art. 681. It seems plain that these statutes intended expressly to relieve judges of the labor and duty of writing charges in misdemeanor cases, and we think that in some instances it is not only unnecessary, but it would be highly proper for them to decline to do so. If counsel wish a written charge, it is their duty to prepare and submit it. But it may be asked, how are the jury to be informed of the law with relation to, and the punishment affixed to, the offence, if no written charge is given and the parties have not consented to a verbal one, under the provisions of art. 682, Code of Criminal Procedure? We answer that in such case the judge can read from the statutes such portions as are necessary to inform the jury of the nature, definition, and punishment of the offence. To do this is no violation of the article just cited about verbal charges. This we believe to be the law, notwithstanding a contrary doctrine seems to have been held by our Supreme Court in *Carr v. The State*, 41 Texas, 546. A charge, technically speaking and

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such an one as is doubtless intended in all the articles of the Code above quoted, means the enunciation and application of the principles of law to the substantive issues and the facts as adduced in the evidence on the trial of the case.

But in this case at bar, the court, without, so far as the record shows, being requested to do so, has given a written charge which is in our opinion erroneous in the particulars pointed out by the assignment of errors and discussed in the brief of counsel for appellant. No exceptions were reserved at the time, however, to the charge, nor were additional or counter charges asked and refused. Where this has not been done, this court will not notice the errors in the charges given. *Forrest v. The State*, 4 Texas Ct. App. 232, and authorities cited. The statute itself says the judgment will only be reversed in any criminal case for violation of the statute with regard to the charge, “*provided the error is excepted to at the time of the trial.*” Code Cr. Proc., art. 685, *supra*.

In so far as it is claimed that the court erred in overruling the motion of defendant Harris for a new trial, a thorough inspection of the record with a view to his branch of the case fails to exhibit any peculiar or extraordinary merit in his motion, requiring that it should have been granted. We are of opinion the court committed no error in overruling it.

In the brief of counsel for defendant Hobbs it is urged that the evidence is insufficient to sustain his conviction, because it establishes that this defendant had bought the hogs of his co-defendant, Harris. Counsel is mistaken in the purport of the evidence as it appears in the record. True, Hobbs said he had bought the hogs of Harris, but when Hobbs and Harris, and Odell, the owner, were together talking over the matter, Harris denied that he had sold the hogs to Hobbs; and on a subsequent occasion, when Hobbs and Odell saw one of the stolen hogs in the

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woods, in Hobbs's mark, "Hobbs denied buying it from Harris, saying that was not the one he bought."

We have been unable to discover any such tangible or available error in the record as would authorize a reversal of the judgment, and it is therefore affirmed.

Affirmed.

J. SLAUGHTER v. THE STATE.

1. **ALTERING CATTLE-BRANDS.** — If, with fraudulent intent, the defendant altered the brand on an animal, the property of some other person, into a different brand, the statutory offence of fraudulently altering a brand is complete, no matter what the instrument or means by which the alteration was effected.
2. **SAME.** — To constitute an alteration of a brand, it is not necessary that the original scar has been changed; the alteration may, as in the present case, be done by so clipping the hair on the original brand as to change it into another one.
3. **PRACTICE.** — When the evidence tends to establish opposite conclusions, it is for the jury to find their verdict on that which they deem most credible; and if the judge who tried the cause has refused to set aside the verdict found on such evidence, the conviction will not be disturbed on appeal.
4. **EVIDENCE OF INTENT.** — Note in the opinion facts in proof deemed ample to show that the brand was altered with a fraudulent intent.

APPEAL from the District Court of Burnet. Tried below before the Hon. W. A. BLACKBURN.

It was in proof that the animal was regarded as an estray and the owner as unknown, in the neighborhood where it was taken by the appellant, who clipped the hair on the brand upon it so as to give the brand quite a different appearance. Other facts of significance appear in the opinion of the court. The punishment assessed was two years in the penitentiary.

Makemson & Fisher, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

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WHITE, P. J. Appellant was indicted under art. 2412, Pasc. Dig. (Rev. Stats., Cr. Code, art. 760), for fraudulently altering the brand of a yearling, the property of some person to the grand jurors unknown. The indictment was a good one. *Haws v. The State*, 41 Texas, 161; *Culberson v. The State*, 2 Texas Ct. App. 324.

The evidence showed the alteration to have been made by clipping some of the hair from the brand of the animal, whereby it was changed. This, it is contended, was not such an alteration as the law contemplates. It is insisted that nothing short of the alteration of the *scar* made originally by the branding-iron is an alteration of the brand. Upon this subject the court charged the jury that, "by altering a brand is meant that the brand on the animal is changed into a different brand." And again: "If a brand is changed or altered, it makes no difference in law by what instrument such change is made." This charge was correct. The questions are, was the act done with a fraudulent intent? and has the brand been changed or altered from what it was to another and different brand? *Linney v. The State*, 6 Texas, 1. If so, it matters not by what means the alteration was effected, the offence is complete. The charge of the court was full, and as favorable to the defendant as the facts warranted, and embodied in substance the special instruction asked for defendant.

With regard to the evidence, whilst it might be admitted, if necessary, for the sake of argument, that it was conflicting, still, under the well-established rules in such cases, the appellant would not be entitled to a reversal. These rules are, that "when the evidence on the trial of a criminal case tends to establish different and opposite conclusions, it is for the jury to find their verdict upon the evidence which in their judgment is entitled to the most credit; and if the judge who has tried the cause has refused to set aside the verdict of guilty found on such evidence, the conviction will not be disturbed in this court." *Williams v. The State*, 41 Texas, 209.

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But let us see what the evidence for the defence was. In the first place, he told the witness Crockett that he had bought the animal of one H. F. Brantley. But the mark and brand do not correspond with Brantley's, and the alteration of the brand is made to fit the recorded brand of Brantley. If a doubt could have arisen as to whether the brand was Brantley's as is pretended, how about the mark, about which there could be and was no controversy? Such a difference as is here exhibited in the marks was too marked to have misled, and, with a party honest and acting in good faith, should have solved the doubt as to the brand against the ownership and claim of Brantley. On the trial this pretended purchase from Brantley is changed into authority to use Brantley's cattle, by virtue of a power of attorney executed by Brantley to one F. M. Slaughter. How defendant acquired a right to avail himself of a power of attorney executed to F. M. Slaughter is not shown, nor is any connection of any sort established between defendant and F. M. Slaughter.

The witness Beck says that the animal had been running with his cattle. Defendant came to his house and asked him if he (witness) owned or claimed the animal. Witness told him he did not. Defendant then said, "Well, it is a sleeper, and I'll get away with it." If he had bought it of Brantley, or if he was authorized by power of attorney from Brantley to take and use it, it being Brantley's, why does he ask Beck if he claims it? and why, when Beck informs him that he does not, does he recognize and pronounce it "a sleeper," and declare his intention to get away with it? These facts are too glaring, too inconsistent with honesty of purpose, to deceive or for a moment mislead an honest jury seeking to ascertain guilt beyond the possibility of a reasonable doubt.

The evidence was amply sufficient to authorize the verdict. In fact, no error appears to have been committed on the trial, and the judgment is therefore affirmed.

Affirmed.

Syllabus.

J. R. MOREHEAD *v.* THE STATE.

MINUTES OF COURT. — If the record fails to show that the defendant pleaded to the indictment, or that his plea was entered for him, the conviction cannot stand.

APPEAL from the County Court of McLennan. Tried below before the Hon. G. B. GERALD, County Judge.

The offence was the selling of lightning-rods without paying occupation-tax.

Herring, Anderson & Kelly, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. In this case the record fails to disclose that defendant pleaded to the indictment. The record must show affirmatively the entry of the plea, or the conviction cannot stand. *Stacey v. The State*, 3 Texas Ct. App. 121; *Satterwhite v. The State*, 3 Texas Ct. App. 428; *Morris v. The State*, 4 Texas Ct. App. 489; *Bush v. The State*, 5 Texas Ct. App. 64.

The judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN LANHAM *v.* THE STATE.

1. CONSTRUCTION OF STATUTE. — An act of 1879, which contained an "emergency clause," changed the times of holding the District Courts in the Twenty-second Judicial District; but a *proviso* in the act required that the first term held under it should be held in C. County, which term in C. County was fixed by the act for the third Monday of September, 1879. *Held*, that, notwithstanding the "emergency clause," the *proviso* operated to postpone any change in the times of holding the said courts until the first term could, in compliance with the act, be held in C. County; and that, in the interim, the antecedent act fixing the terms of the courts remained in force. *Graves v. The State*, 6 Texas Ct. App. 228, cited approvingly on this question.

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2. **CHARGE OF THE COURT.** — In a trial for murder, the defence asked that the jury be instructed, in effect, to consider no evidence which implied the existence of better evidence not produced or accounted for, and, with this view, to consider whether the testimony of by-standers implied that a certain person who was first assailed by the defendant could, if produced, have given better evidence than the by-standers. *Held*, correctly refused, because invasive of the province of the jury; and because, if not a direct charge on the weight of evidence, it was likely, if given, to be construed by the jury as disparagement by the court of the evidence adduced.
3. **PRACTICE.** — Objections to the admissibility of evidence cannot be raised by asking instructions to the jury. They should be taken when the objectionable evidence is offered. If, when evidence is introduced, it is found to imply the existence of better evidence, a motion to exclude it is the proper practice; and if the motion was overruled, a bill of exceptions would bring up the ruling for revision on appeal.
4. **EVIDENCE.** — The testimony of belligerents cannot be supposed to be better evidence of what transpired in an exciting *rencontre* than that of by-standers who witnessed but were not engaged in it.
5. **COSTS IN CAPITAL CASES.** — To its judgment on a capital conviction, the court below appended a judgment against the defendant for all costs, which is assigned as error on the ground that, contrary to constitutional inhibition, it “seeks to forfeit the appellant’s estate,” and because it “subjected his estate to the costs of the prosecution,” contrary to the article of the Code which provides that, “in case of the execution of a convict, or where he is imprisoned for life, there shall be no forfeiture of any kind to the State, nor shall any cost of prosecution be collected from his estate.” *Held*, that these constitutional and statutory provisions are applicable and operative after the judgment in such a case has gone into effect, when, if infringed, they are available to the convict’s representatives. It is the better practice, however, to render no judgment for costs in such cases.
6. **PRACTICE IN THIS COURT.** — Express authority is vested in this court to reform and correct judgments of the courts below. Rev. Stats., Code Cr. Proc., art. 869.
7. **FACT CASE.** — See evidence held sufficient to support a conviction for murder in the first degree.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. NOONAN.

By indictment filed October 24, 1878, John Lanham was charged with the murder of Georgie Drake, by shooting her with a six-shooter pistol, on the 3d of August, 1878. It is seldom that the facts and details of a case of this character are elicited so distinctly and consistently as those

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narrated in the record made up on his appeal from the judgment of death by hanging, based on his conviction by the jury of murder in the first degree. The trial was had on the 22d of May, 1879.

The defendant and the deceased, it appears, were members of a theatrical company conducting the "Green Front Theatre" in the city of San Antonio, which seems to have been patronized by soldiers of the United States army stationed there, and a few of whom were conspicuous though involuntary characters in the tragedy which terminates so fatally for the appellant.

India Carrera, a member of the company, was the first witness introduced by the prosecution. Her testimony was as follows: —

"I went to the theatre on Saturday night, August 3, 1878, to work. When I passed back to the stage, I saw the defendant and Georgie Drake talking. They were upon the stage, and Georgie looked as if she had been crying; and the defendant was very much excited. He had a pistol in his hands. After talking awhile with Georgie, in my presence, he shook the pistol under my nose, and said: 'They got the best of me last night, but to-night I will give them a *matinée*.' I replied to him, 'Don't be foolish, but put your pistol up.' I then went into my dressing-room, and defendant and Georgie went into another room and talked there a few moments. The defendant then went out on the street, and Georgie came to my room and said: 'I am afraid Johnnie has a pistol, and he is going to shoot some one. I will go down and tell them.' Georgie then left me on the stage, and went down on the floor of the hall and began talking with Squires, Tibbits, and others.

"The defendant was out about fifteen or twenty minutes, when I saw him returning to the hall, passing near where the deceased was standing; and after passing the deceased, I saw Squires following, and calling to him, 'Johnnie!

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Johnnie ! I have nothing against you ; let us have no difficulty.' The defendant made no reply, but passed on to the rear of the building, and to the door leading into the wine-room. He passed up the steps to the wine-room floor, and Squires reached the bottom as the defendant reached the top of the steps. I was then in my dressing-room, and there was a door leading from it into the wine-room, and the defendant was standing in full view, opposite this door. While in this position I heard Squires's voice at the bottom of the steps, saying, 'Johnnie, put up your pistol ; I have nothing against you.' The defendant instantly shot the pistol at Squires. Squires then ran up the hall towards the bar, and the defendant followed after him, and shot at him a second time. He fired a third shot, and then ran up to where Georgie Drake, the deceased, was standing, and shot her down.

“ My dressing-room, in which I was, had been a private box, and there was a window from which I was looking, and could observe everything going on or transpiring on the floor. I saw Georgie fall at the fourth shot, throwing her hand to her face. The smoke from the pistol had become so thick I could not well distinguish objects, and thought it might be my sister, whom I was expecting to enter the door near where the deceased fell ; in fact I thought two persons had fallen at that place, but one was a man who had stooped down to help Georgie just as she had fallen.

“ I left my dressing-room and went to where Georgie had fallen, and they took her up very soon and carried her in the back yard. She was taken from there and carried to the Sisters' Hospital, where she died next morning. The ball entered her chin and came out at the back of her neck. Her face was badly powder-burned about the wound.

“ I had a conversation with the defendant on Friday, the day before the killing. It seems there had been a misunderstanding between Georgie Drake and the defendant. On Thursday before the killing, he handed to my sister

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and self two fifty-dollar bills, and told us to give it to Georgie if she would make friends with him. On Friday he called on us, between 9 A. M. and 4 P. M., and asked us what Georgie said. We told him she said he had whipped and mistreated her; that she would not make friends with a man who would treat her in that manner, and refused to take the money. We handed it back to him, and he said: 'I will kill her, then, if she don't do it.' I do not remember the exact hour this conversation was had, but it was between my breakfast-hour, at 9 A. M., and my dinner-hour, at 4 P. M.; I know this because I remember of our talking about it at the dinner-table. On Saturday, before the killing, I talked with the defendant again. He was very angry, and said he 'would get even with them yet;' that he would 'have a *matinée*' of his own. This all occurred in Bexar County, State of Texas."

The cross-examination elicited nothing additional, except that the witness understood the defendant to have reference to Squires and Tibbits when he said, "They got the best of me last night, but I'll get even with them to-night."

The next witness for the State was James Harper, who seems to have been a cook or a waiter in the service of the establishment. About half an hour before the killing, as he was starting back from the theatre, to which he had just carried supper, he had a conversation with the defendant, who said to the witness, "Hold on, I want to see you a moment." They sat down in the doorway of the theatre, and defendant asked witness, "Did Squires stay with Georgie last night?" Witness replied, "I don't know; reckon he did; he was there this morning." Defendant then said, "She has done me a mean trick, and before she shall live with anybody else I will kill her." Witness told him not to get into any trouble about her, and he said, "Jim, my mind is made up; I intend to kill her and them soldiers too; I won't give her up to them soldiers. I will make my escape if I can; if I cannot, I'll kill myself; I am not going to be

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arrested." Witness left, and hastened to dissuade the deceased from going to the theatre, telling her what the defendant had just said to him. She replied, "Ah, get away, you son of a gun!" and she then went on to the theatre. Witness returned to the theatre, and saw her with Squires, Tibbits, and some other soldiers, standing in the hall, near the rear end from the stage, talking. The defendant passed near by them, going towards the wine-room, when Georgie Drake said to Squires, "There goes Johnnie, now; go and tell him that you have nothing against him." Squires said, "No; I don't want to say any thing to him." Georgie said, "Yes, for my sake tell him." Squires then followed the defendant towards the wine-room, and the shooting ensued substantially as already narrated by India Carrera, the first witness.

On cross-examination, the witness stated that he heard the defendant and Squires quarrelling the Thursday night before the killing. As the defendant and Georgie were returning together from the concert that night, witness heard her say to the defendant, "Don't strike me any more." Then Squires ran up and knocked the defendant down with his fist. Defendant picked up a rock and knocked Squires down, and then went off and stayed away all night. The next morning, Squires and Tibbits went to the house of Laura Davis, where the deceased was boarding; they had their pistols on. Defendant came, and they had a talk, made friends, and settled their difficulty; and then Squires and Tibbits unloaded their pistols and hung them up in a tree. Defendant came into the kitchen, where witness was cooking, and from which they could see Squires and Tibbits in the yard. The defendant pulled out his pistol and said, "I have a good mind to shoot the guts out of those sons of bitches." Witness told him to go away, and he went; and then witness told Squires and Tibbits what the defendant had said, and Squires reloaded his pistol and said, "If he makes a move at me, I will kill him." That

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night twelve soldiers came to Laura Davis's, while the defendant was upstairs in Georgie's room. Some of the soldiers went into the room, and Georgie went into another room. One soldier said, "There is nobody in here;" and another said, "Yes; there he is, under the bed." One of them, named Buck, said, "Pull the son of a bitch out, and let us throw him out of the window." Laura Davis interposed, telling them she wanted no one killed at her house. When the conversation between witness and defendant took place on Saturday evening, about half an hour before the killing, the defendant was "drinking some, but not drunk; he knew what he was saying and doing."

Henry Ansell, for the State, testified that between three and four in the afternoon of the day of the homicide the defendant said, in the presence of witness and F. Howard and E. Hart, that he intended to kill Georgie Drake that night, and somebody else whom he did not name.

Charley Davis, for the State, testified that when Georgie Drake was killed he kept the lunch-stand at the theatre, and was there when it occurred. Just before it was done, the defendant came to the lunch-stand, and said to witness, "I am going to have a *matinée* here to-night." Witness replied, "Nonsense!" Defendant then ran his hand in his pocket, pulled out a roll of greenbacks and some gold, and said, "Here is money enough to bury me if I don't get away. I am going to do some shooting, and will kill two soldiers and Georgie Drake, — get away if I can, and if I can't, I intend to kill myself." He further said, "They have had their day, and I am now going to have mine;" and then immediately passed into the hall. The subsequent incidents were related by the witness in substantial accord with the testimony of Harper and India Carrera. This witness, however, stated that the defendant's third shot took effect in the arm of a citizen named Bailey, and that the shot which killed Georgie Drake was fired by defendant when he got within four or five feet of her, and as she threw up her

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hands and exclaimed, "My God, Johnnie!" The deceased had boarded and lodged at witness's house for about two weeks before the homicide, and the defendant lodged with her every night until the Thursday night before he killed her. They had a difficulty that day, and he did not lodge with her afterwards. The witness said that the defendant was usually very quiet, and had but little to say, but that on the day of the homicide he was talking a great deal. When he was talking to witness, just before the killing, he walked straight, and seemed to have control of his mental faculties; "he was intoxicated, but not what I call drunk."

Dr. Cupples, introduced by the State, testified to his examination of the wound, and described the direction and effects of the bullet. On cross-examination, he stated that the course of the bullet indicated that the deceased was leaning forward when the shot struck her, or else that it was fired from an elevation.

The State examined two other witnesses who were on the spot where and when the deceased was killed. Their testimony was, in every particular of any consequence, identical with that already narrated. One of them stated that the deceased had invited Squires and Tibbits to call for and escort her to the theatre, but that on the evening of the homicide she had left her boarding-house for the theatre before they called for her.

The defence introduced Dan Ryan, who testified that he saw the defendant about ten o'clock on the day of the homicide, and again about three or four o'clock in the afternoon. "He was under the influence of liquor; he was not in his usual frame of mind, but was excited and angry." Witness saw him take a drink or two in the morning, and two or three in the evening. In the afternoon, John Hunt and the defendant were out driving in a buggy.

John Hunt, for the defence, testified that he and the defendant were out buggy-driving through various streets

Argument for the appellant.

in San Antonio from about one o'clock to half-past three on the day of the homicide. They took a great many drinks *en route*, — the witness enumerating seven places at which they drank, and implying an indefinite number besides. On cross-examination, he stated that about three o'clock the defendant stopped on Main Street and bought a new six-shooter.

A. Reaver, for the defence, stated that he had known the defendant for some two years, and gave him an excellent character for sobriety, industry, trustworthiness, and peacefulness. On cross-examination, this witness testified that about two o'clock on the day of the homicide the defendant hired from him the buggy in which defendant and Hunt took their drive. Defendant returned the buggy in about two hours. Witness did not observe or suspect that the defendant was drinking, either when he got or returned the buggy. This closed the evidence in the case.

The court charged the jury amply and clearly upon murder in the first and in the second degree, and upon malice express and implied. At the instance of the defence, the jury were instructed upon the legal effect of drunkenness as explanatory of conduct or indicative of want of motive, and all the charges asked by the defence were given except the one set out in the opinion and held to have been properly refused. All other matters appear in the opinion of the court.

W. C. Belcher, for the appellant. The attention of this court is called to the judgment rendered in this cause, wherein it seeks to forfeit appellant's estate, and directly subjects it to the costs of this prosecution. This is contrary to our Bill of Rights and statute, and would be sufficient and proper cause of reversal without being assigned for error, since it is apparent from the face of the record and goes to the foundation of this action. Const. 1875, Bill of Rights, sect. 21; Pasc. Dig., arts. 1664, 1581.

Argument for the appellant.

In considering the third and fourth assignments of error, we ask the court to carefully peruse the evidence. From this it is obvious that one Squires, a soldier, was the person against whom appellant bore malice, the person attacked, and with whom appellant had previous difficulties; that in the fatal affray Squires was the person whose life was sought, — he was the principal actor in the drama. Parts of his acts and declarations were, in the progress of the trial, detailed by witnesses that came upon the stand, from which it was apparent, after the evidence was closed, that his testimony was the best evidence which the case was susceptible of producing, and superior to that adduced by other witnesses. No reason was given why he was not made a witness, nor was his absence accounted for. Under these circumstances, the court was asked to charge the jury to exclude such “evidence as implies that better evidence exists,” etc. In refusing this charge, we contend that the court erred. 1 Greenl. on Ev., sect. 82; *Porter v. The State*, 1 Texas Ct. App. 394; *Barnell v. The State*, 5 Texas Ct. App. 115.

While the charge as requested may not have properly presented the question to the jury, it was sufficient to call the court's attention to the subject, and it should have given a charge appropriate to the question presented. *Ferrell v. The State*, 43 Texas, 507.

We deem the verdict contrary to the law and the evidence, and present the same in the fourth assignment of error. An attentive examination of the facts shows that appellant's malice was towards Squires, and not the deceased; and that deceased was accidentally killed as she entered the door of the theatre, by a shot that was intended for Squires and his fellow-soldiers. This is not murder in the first degree. *Farrer v. The State*, 42 Texas, 271; *McCoy v. The State*, 25 Texas, 33.

We would respectfully urge that the offence committed could not be murder in the first degree, because appellant,

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admitting for the sake of argument that he was not insane from intoxication, after having fired three shots at and while pursuing the soldiers, was not in a condition to take deceased's life with a sedate mind and deliberate design, nor could he then have been executing a previously formed design against the deceased, with whom he had held a friendly conversation "upon the stage" not more than five minutes before the fatal occurrence.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. John Lanham, the appellant in this case, was indicted in the District Court of Bexar County, at the October term, A. D. 1878, for the murder of one Georgie Drake. The deed was alleged to have been committed on the third day of August, 1878. On his trial, which took place on the twenty-third day of May, 1879, he was convicted of murder of the first degree, with his punishment affixed at death by hanging.

A jurisdictional question was raised in the motion to arrest the judgment, on the ground that "the act of the Sixteenth Legislature changing the times of holding the courts in the Twenty-second Judicial District did not authorize the holding of a term of the District Court in Bexar County between the eighteenth day of April and the twenty-fourth day of May, A. D. 1879; and that this law is the only one regulating the times of holding courts in this district, all others being in conflict with and repealed by it." Acts 16th Leg., Gen. Laws, p. 106.

This identical question was raised in the case of *Graves v. The State*, 6 Texas Ct. App. 228, which was a case appealed from the District Court of Bexar County, and it was there held that the antecedent act of 1876, prescribing the times and terms of holding the District Courts in the Twenty-second District (Gen. Laws 15th Leg., p. 11), controlled and regulated the subject, its provisions being oper-

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ative until the act of 1879 went into effect. Agreeably to the law as announced, and so well supported by authority, in the Graves case, the court did not err in overruling defendant's motion in arrest of judgment.

It is urgently insisted in the brief of counsel for appellant that the court erred in refusing to give in charge to the jury a special instruction in the following language: "The jury, in framing their verdict, will consider all evidence not excluded in the progress of this trial, except such evidence as implies that better evidence existed and is withheld or not accounted for; and in this connection it is proper that the jury consider whether the evidence adduced by other witnesses implies that the party first assailed by defendant would have been competent to give better evidence than that adduced." Several objections suggest themselves to this instruction, which in our judgment fully sustain the action of the court. Two only will be noticed. *First*, it sought to invade the province of the jury by telling them what evidence they should consider and what reject from their consideration; *secondly*, if not a direct charge upon the weight of evidence, it was certainly calculated to impress upon the jury that in the opinion of the court the proof adduced was not the best and most satisfactory of which the case was susceptible, and that in consequence the court doubted its sufficiency to establish the crime alleged.

Objections to the admissibility of evidence cannot be raised by asking instructions to the jury. *Nalle v. Gates*, 20 Texas, 315. In practice, the proper mode of reaching the matter sought to be attained would have been, when the evidence was proposed, to have objected to it; or, after it was adduced, to have moved to exclude it on the ground that it presupposed the existence of better testimony which was withheld or not accounted for. Then, had the court overruled the motion, a bill of exceptions reserved to the action would have submitted the subject appropriately for revision. Where this has not been done, the duty of this

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court in examining the record will be to see that the conviction is sustained by a sufficient amount of legal and competent testimony. Correctness of the rules of evidence as declared in *Porter v. The State*, 1 Texas Ct. App. 394, and *Barnell v. The State*, 5 Texas Ct. App. 115, cited by counsel, is not doubted, and in a proper case and under proper circumstances, as in those cases, would, where it had not been adduced, require a reversal of the judgment for want of the best evidence. In the case we are considering the rule does not apply, under the facts established. Here the whole transaction occurred in the presence and hearing of the witnesses who have testified. They were persumably in a better position to see, hear, and recollect everything that was said and done by the parties actively engaged than the parties themselves, who were at the time assailed, fired upon, and fleeing from the defendant. It is unreasonable to suppose that these latter parties, in the excitement incident to their situation, could or would see, hear, and recollect more distinctly what was said and done than third parties who were only spectators of, and not participants in, the thrilling events.

A single bill of exceptions appears in the record, and that was saved to the ruling of the court in refusing to permit the witness Ryan to answer a question propounded to him by defendant's counsel, the question being, "What was the opinion of the witness in regard to the condition of defendant on the day of the killing." In signing this bill the judge says, in explanation: "The witness Hunt was required, before giving any opinion, to give all of the particulars of his intercourse with the defendant on the day of the shooting, which he did, — minutely and in detail stating where they went, what they did, and what they drank; and then he stated the condition of defendant according to his opinion, as will be seen by the statement of facts in the cause." We take it that in writing the above the judge has by clerical error inserted the name of Hunt instead of Ryan.

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This presumption is borne out by a reference to Ryan's testimony, who says: "I know defendant, and saw him on the day that Georgie Drake was killed; I saw him take a great many drinks, and I drank with him; he was under the influence of liquor; he was not in his usual frame of mind, but was excited and angry." It is apparent from this extract from the testimony of this witness that he was not only not prohibited from expressing his opinion as to the condition of the accused, but that he has done so, it seems, as fully as he was capable of doing. One of the theories of the defence was that defendant, when the homicide was committed, was intoxicated to an extent that he was irresponsible for his actions. Every opportunity to make it good, if possible, was, it appears to us, afforded defendant. In addition thereto, defendant's counsel framed and submitted to the court special instructions with regard to this defence, which were given in charge to the jury without change or modification by the court. No error is made to appear in this connection.

Some objections are urged to portions of the charge of the court. These we have considered attentively, and find them untenable. In its presentation of the law the charge is fully sustained by precedent, and was directly and pertinently applicable to the particular facts developed in the evidence.

Another supposed error grows out of the judgment rendered in the case. After the usual formulary, including a copy of the verdict, the judgment proceeds: "Whereupon it is ordered, adjudged, and decreed by the court that the defendant, John Lanham, be hung by the neck until he is dead; that he now be remanded to the county jail, and that he be there securely kept by the sheriff of Bexar County until the execution of this judgment, hereafter to be pronounced by the sentence of this court. *It is further ordered by the court that the State of Texas do have and recover of and from the said defendant all costs herein*

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expended.” We have italicised the last recital, which is the portion specially complained of as error.

It is urged that this provision of the judgment “seeks to forfeit appellant’s estate, and directly subjects it to the costs of this prosecution;” that this is contrary to our Bill of Rights, and in contravention of the express provisions of our statute; that it is a fundamental error, apparent of record, and sufficient to require a reversal of the judgment.

We find the twenty-first section in the Bill of Rights, art. 1 of our Constitution, declares that “no conviction shall work corruption of blood or forfeiture of estate.” With regard to capital cases and felonies, where the punishment is assessed at imprisonment for life, our statute provides: “In case of the execution of a convict under sentence of death, or where he is imprisoned for life, there shall be no forfeiture of any kind to the State, nor shall any cost of prosecution be collected from his estate.” Pasc. Dig., art. 1664; Rev. Stats., Penal Code, art. 60.

We do not see how the defendant in this proceeding can avail himself of these constitutional and statutory provisions. It is evident that these provisions can only apply to that state of case when the judgment of conviction has actually gone into execution. When the convict has suffered the penalty of death, or when he is undergoing a life-term of imprisonment in the penitentiary, then the statute inhibits the collection of the costs from his estate. In such event the question might well and successfully, we think, be raised by his heirs, or those entitled to the estate, against any effort to render it liable to the payment of the costs of the prosecution. The judgment in regard to costs is not void, but voidable in such cases at the instance of the convict’s representatives. Even if that portion of the judgment was void, it would not necessarily invalidate the other portions which are not objectionable; for, under authority expressly conferred by statute, this court might and would

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reform and correct its defects. Pasc. Dig., art. 3208 ; Rev. Stats., Code Cr. Proc., art. 869 ; *Prince v. The State*, 44 Texas, 480 ; *Cain v. The State*, 20 Texas, 355 ; *Cordova v. The State*, 6 Texas Ct. App. 455. We are of opinion that the proper practice would be to omit rendering a judgment for costs in such cases as are mentioned in the statute.

It only remains now to look at the sufficiency of the evidence, which is also controverted on this appeal. A calm and most serious consideration of it in all its aspects and bearings must, we think, convince and satisfy beyond doubt any unprejudiced mind that the prosecution has most fully established the charge preferred in the indictment.

Defendant and deceased had lived together for some time in criminal intimacy. He suspected and charged her of criminal intimacy with others. This caused difficulties, disputes, quarrels, blows, and a separation between them, and a fight ensues between defendant and his favored rival the day prior to the killing. Defendant determines to have revenge. He tells his friends that he intends to kill the soldiers who have interfered between him and his paramour, and to more than one, on the day of the killing, he expresses his determination to take the life of the deceased. During the day he stimulates himself with strong drink, and in the evening purchases the pistol to be used in the "*matinée*" which he says he is to have, and to which he invites his friends. With a purpose firmly and deliberately fixed, he goes to the theatre where the tragedy is to be played which he has concocted, and there, whilst his intended victims are endeavoring to soothe and palliate his anger with assurances of good-will and friendship, he turns upon them and without reply begins the firing. Three shots are aimed at the fleeing "soldiers." He then turns, and, advancing upon deceased, who is standing off some distance powerless and evidently appalled at the scene, he fires upon her at such proximity that her face is powder-

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burnt. The bullet passes through the face, fractures the spinal column, and comes out at the back of the neck. His victim falls to the ground, and death ensues from the effect of the wound. So soon as the fatal shot is fired, defendant flees. Is any thing wanting to make this a case of murder in the first degree, — a murder on express malice? If so, we have failed to discover it.

Impressed with the deep solemnity of the issue involved, we have considered the record with all the care the gravity and importance of the case required. We have found in it no such error with regard to the law or facts submitted to us in the record as would authorize us to disturb the judgment, and it is therefore affirmed.

Affirmed.

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G. McMILLAN v. THE STATE.

1. PRACTICE. — Subject to certain prescribed regulations, the general control of criminal trials is confided to the discretion of the judges who preside thereat; and on this court is devolved the duty of correcting abuses of that discretion to the prejudice of defendants.
- 2 SAME. — Witnesses may be placed under the rule at the instance of either party, and be kept in charge of an officer or allowed to go at large as the court may direct; and by like direction those for the prosecution may be kept separate from those for the defence. A wide discretion over the subject is vested in the presiding judge, to the end that the integrity of the evidence may be protected against sinister influences; and the exercise of this discretion will not be revised on appeal, unless an abuse of it to the prejudice of the defendant be made to appear.
3. CHARGE OF THE COURT. — In a trial for felony the court below prominently propounded to the jury the inquiry whether, from the evidence they should find to be true, they could “reasonably conclude that the defendant is innocent,” and in that event directed an acquittal, otherwise a conviction. *Held*, essentially erroneous and prejudicial to the defendant, because, overlooking the presumption of innocence, it reversed the rule of law by requiring the jury to reach the conclusion of innocence before they could acquit. See the opinion *in extenso*.
4. CHALLENGE. — A juror already accepted cannot be challenged peremptorily.

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APPEAL from the District Court of Navarro. Tried below before the Hon. D. M. PRENDERGAST.

The appellant and one John Brown were jointly indicted for theft of a bale of cotton, worth \$40, belonging to William Polk. A severance being awarded, the appellant was tried, found guilty, and his punishment assessed and adjudged at four years in the penitentiary.

The evidence was circumstantial and conflicting, but, not being reviewed by this court, need not be here detailed.

Simkins & Simkins, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. It is believed that the fourth and sixth assignments of error filed by appellant present the only questions necessary to be discussed in determining the validity or invalidity of the conviction in this case. These are : —

“ 4. The court erred in allowing W. A. Polk to remain in court during the examination of witnesses, and then to be placed upon the stand in rebuttal, — the said witnesses having been all placed under the rule at the request of the State, and the said W. A. Polk being the principal prosecuting witness.

“ 5. The court erred in giving instruction marked three in direct charges.”

The general control, supervision, and direction of criminal trials is confided by the law to the sound discretion of the judges who preside thereat, subject to certain regulations prescribed by the Code ; and the correction of any abuse of discretion to the material injury of the defendant, when made to appear, to this court. On any trial, at the request of either party, the witnesses may be placed under

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the rule, and those summoned for the prosecution may be kept separate from those summoned for the defence, if the court sees proper to so direct; and they may be placed in the custody of an officer, or be allowed to go at large, under a like discretion. Pasc. Dig., arts. 3047, 3048, 3049.

The language of these several provisions makes it clear, beyond question, that judges are vested with a wide discretion in all matters relating to this procedure, and that the fundamental purpose to be subserved is to preserve the integrity of the evidence, and to so guard its introduction that one witness shall not be affected by the testimony of those who may precede him. *Davis v. The State*, 6 Texas Ct. App. 196; *Ham v. The State*, 4 Texas Ct. App. 645; *Jones v. The State*, 3 Texas Ct. App. 150; *Brown v. The State*, 3 Texas Ct. App. 294; *Treadway v. The State*, 1 Texas Ct. App. 668; *Sherwood v. The State*, 42 Texas, 498; *Roach v. The State*, 41 Texas, 261; *Goins v. The State*, 41 Texas, 334; *Kemp v. The State*, 38 Texas, 110.

Applying these well-established principles to the case at bar, we fail to perceive in what manner this action of the court was an abuse of discretion calculated to affect any material right of the defendant. The witness permitted to remain in the court-room after his examination, and to testify in rebuttal, is not shown to be a person calculated to be affected by the testimony of others, and it may be inferred from the record that he was one of the most intelligent witnesses placed upon the stand.

It is complained, however, in the briefs of counsel, that his presence in the court-room during the progress of the trial served to intimidate the witnesses for the defence, and to encourage those for the prosecution. This does not appear from the record before us, and in its absence this court cannot assume its existence. The right to enforce the rule is a right given by law, and it should neither be denied nor substantially abridged at the arbitrary discretion of the presiding judge; but, in the absence of some showing

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to that effect, we are not prepared to say that the action of the court was an error to the prejudice of the appellant.

That portion of the charge complained of is as follows: "Can the facts and circumstances you find from the evidence to be true exist, and can you, in view of these facts and circumstances, reasonably conclude that the defendant is innocent? If so, you should find him not guilty; otherwise you should find him guilty."

Immediately preceding this charge, the jury are substantially instructed as to the law of circumstantial testimony, and the paragraph objected to is succeeded by the usual instruction as to the presumption of innocence and the law of reasonable doubt. We deem the charge essentially erroneous, and to the prejudice of the defendant.

It was evidently the purpose of the learned judge to furnish the jury a concise test in the form of a question, the answer to which would solve the issue submitted to them; and had apt language been employed, the practice is one to be commended. But in the shape it was presented to the jury it reversed the rule of law, and devolved upon the jury the necessity of reaching a conclusion that the defendant was innocent before they could find him not guilty. This is never incumbent on a jury in a criminal prosecution. The law clothes the prisoner with the presumption of innocence, which continues throughout the trial and until the return of a verdict of conviction. It is never exacted of a jury that they should find the defendant innocent of the crime imputed to him, but the burden rests upon the prosecution throughout the trial to establish his guilt to their satisfaction. They need never conclude, reasonably or otherwise, that the defendant is innocent, but their functions are at an end when they reach a conclusion that the evidence fails to satisfy their minds that he is guilty under the law.

We cannot say that this instruction, qualified though it may have been in other parts of the charge, did not affect the finding and lead to the conviction of the defendant. It

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constitutes the most salient feature in the charge, and was well calculated to impress itself upon the minds of ordinary jurors and to serve them as a guide in their deliberations.

No substantial errors are perceived in the rulings of the court upon the evidence as set out in the various bills of exception, nor in refusing to permit the defendant to peremptorily challenge a juror already accepted by him. Established practice requires that in such cases the challenge can be for cause only. *Horbach v. The State*, 43 Texas, 260.

For the error indicated in the charge, the judgment is reversed and the cause remanded.

Reversed and remanded.

J. S. JENKINS v. THE STATE.

MALICIOUS MISCHIEF. — In a trial for malicious mischief, alleged to have been committed by pulling down the fence of another without his consent, the court below did not err in confining the inquiry in regard to the possession to the question of the actual, quiet, and peaceable possession. The right of possession as an incident of the title to the land could not properly become an issue in the case.

APPEAL from the County Court of Grayson. Tried below before the Hon. S. D. STEEDMAN, County Judge.

The case is sufficiently stated in the opinion.

N. S. Walton and *W. G. Rose*, for the appellant. The court erred in its instructions to the jury. The first and second instructions were as follows: —

“ 1. The court instructs you that the title to the land upon which the fence was, alleged to have been pulled down, is not a question for your consideration, only so far as it may be necessary in order to identify the land in controversy.

“ 2. If you believe the testimony that J. S. Pattie was in

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the actual, quiet, and peaceable possession of said fence at the time the fence was pulled down, and that the defendant did unlawfully, and without the consent of J. S. Pattie, pull down the fence of the said J. S. Pattie within two years prior to the first day of March, 1879, and within the county of Grayson, you will find him guilty and assess his punishment by fine in the sum not less than ten dollars and not more than one hundred dollars, and in addition thereto you may imprison in the county jail for any length of time not to exceed twelve months.”

It has long been settled by the rules of law and common sense that a court which has no jurisdiction to try the title to land may yet, for the purpose of the suit before it, consider such title. How else is it possible to determine who has the rightful possession? If it were not so, a mere tenant by sufferance, or even a trespasser, might maintain suit against the owner of land, and when the owner brought in the evidence of title the court might answer, “We have no jurisdiction to try the title to land; let the plaintiff recover.”

The defendant in this suit did not want the court to decide upon the title to the land on which the fence was built; but desired only to show that the title had been passed upon by the proper court, and that hence Pattie had no rightful possession whatever. Taking notice of a title that has been settled, and settling a title, are manifestly very different things. The facts show that there was really no controversy as to who owned the land. On one side was the decree of the District Court; on the other, Pattie claimed the land. People thought it was his, and he had paid taxes on it, — things which amount to nothing when it comes to prove ownership. Pattie did not deny the decree, and did not show wherefore he claimed the land, — whether by deed, by decree, by right of conquest, or by tradition. If there had been any *bond fide* controversy about the title to the land, or the facts proved showed any such contro-

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versy, the court might have sent the parties to the proper tribunal to have the dispute settled; but when the controversy was only apparent and the title was in reality settled, then the court should have taken notice of such title just as it would have taken notice of any other fact proved. The court below made the singular mistake of rejecting the decree of the District Court of Grayson County, and at the same time of admitting evidence of general reputation as to who owned the land.

The court below uses the expression, "only so far as it may be necessary in order to identify the land in controversy." The expression is singular, because there are many other ways of identifying land, or indeed any other property, besides designating it by the owner's name. We submit that the first instruction to the jury should have been: "The court instructs you that the title to the land upon which is the fence alleged to have been pulled down is not a question for your consideration, only so far as it may be necessary to show to whom belongs the *rightful* possession." Surely such an instruction could not have been objected to on the ground that the court had no jurisdiction to try the title to land.

Actual, quiet, and peaceable possession is such a possession as may be had by an eagle of his prey, or by the thief of his spoils; but the law requires something more, — a *rightful* possession.

We think that the question of *right* is all-essential, and that "actual, quiet, and peaceable" is but a miserable substitute for it.

We are aware that it has been many times decided that in order to maintain an action of trespass against a mere *stranger or a wrong-doer*, actual peaceable possession is enough; but actual and quiet possession is not enough when the action is brought against the true owner. *Camley v. Stanfield*, 10 Texas, 552, 553; *Campbell v. The State*, 2 Rob. (Va.) 791; *The State v. Headrick*, 3 Jones L. 375 *et seq.*

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It devolved on the State, in a prosecution for cutting and carrying away timber off of land not the defendant's own, to prove that the land was not the defendant's. *Belverman v. The State*, 16 Texas, 131.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was prosecuted by information in the County Court for an alleged violation of the act of April 23, 1873. The information charges that in Grayson County, State of Texas, on or about the fifteenth day of December, 1878, "one J. S. Jenkins, late of said county and State, did unlawfully, maliciously, and mischievously tear down, remove, and injure the fence of one J. S. Pattie, without the consent of said Pattie, to the injury and damage of him, the said Pattie, in the sum of twenty-five dollars."

The only question raised by the charge of the court, and by the instruction asked by the defendant and refused by the court, and embraced in the defendant's bill of exceptions, is as to the possession of the land upon which the fence stood at the time of its removal. The question as to who was rightfully in possession of the land was attempted to be put in issue on the trial, by the defendant, but the court properly, as we think, restricted the inquiry to the question of actual possession. The court could not in this form of proceeding determine the question as to the right of possession.

There was some conflict in the testimony as to who had possession of the property at the time of the alleged trespass upon it. The court charged the jury that if they believed from the testimony that J. S. Pattie was in the actual, quiet, and peaceable possession of said fence at the time it was pulled down, etc., they would find the defendant guilty; and also charged the jury that if they believed from the testimony that the defendant was in actual, quiet, and peaceable possession of the fence, then they would find him not

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guilty. The jury found the defendant guilty; the court entered judgment on the verdict, and refused a new trial. We find no error in the proceedings, presented in such manner as that we are authorized to inquire into it; and therefore the judgment is affirmed.

Affirmed.

WALLACE WEST v. THE STATE.

1. **PETIT JURY — ORGANIZATION.** — When there was no residuum from which to supply the places of regular jurors challenged for cause, the court below correctly required the accused to pass upon those in the panel, and then had the panel filled by summons of qualified persons.
2. **SAME.** — The jury-law designs to supply the courts with a sufficient number of jurors at each term, and intends that they be made available, if practicable, without summoning talesmen.
3. **DYING DECLARATIONS** are competent evidence only in cases of homicide wherein the death of the declarant is the subject of the charge, and the circumstances of his death the subject of the declarations. But note in this case circumstances under which it was held not material error to admit, as part of a dying declaration, a statement not directly declarative of the *res gestæ*.
4. **EVIDENCE.** — In a trial for murder, there being evidence tending to prove that the deceased, when shot by the defendant in an altercation between them, had a pocket-knife in his hand, the defence proposed to prove that at a subsequent but indefinite hour of the same day the defendant was seen, a mile or more from the place of the homicide, with a fresh cut in the lapel of his coat. *Held*, that the proposed proof was properly excluded on objection of the prosecution.
5. **PRACTICE.** — Being convicted of a felony not capital, the defendant moved for a new trial, and pending his motion the act of March 27, 1879, took effect, which authorizes sentence in such cases before appeal taken. His motion was overruled and sentence passed, to which he excepted because his conviction antedated the said enactment. *Held*, that the sentence was authorized by the act referred to.
6. **CHARGE OF THE COURT.** — In a trial for murder in the second degree of a defendant who had been previously convicted of that offence, but had obtained a new trial, the court below, in the charge to the jury, informed them of the previous conviction of the defendant, in connection with instructions to consider of no higher offence than murder in the second degree. No objection was taken to this part of the charge at the time it was given, and it was first mooted in the motion for a new trial. *Held*,

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proper to instruct the jury to consider of no higher offence than murder in the second degree, but in doing so it would have been better not to have informed the jury of the previous conviction of the defendant. In this case, however, no material error is perceived, inasmuch as the attention of the court below was not directed to the matter at the proper time, and as no right of the defendant appears to have been prejudiced.

7. SEPARATION OF THE JURY before verdict does not *per se* vitiate a verdict, even in a felony case. The verdict will be sustained or set aside according to the circumstances.

APPEAL from the District Court of Dallas. Tried below before H. BARKSDALE, Esq., Special Judge.

This appeal is from the second conviction of the appellant for the murder of Robert Montgomery. On his first trial, as well as the second, the conviction was for murder in the second degree, and punishment assessed at five years in the penitentiary. His first conviction was reversed on appeal to this court, and in the report of that appeal, to be found in 2 Texas Ct. App. 209, the principal circumstances attending the homicide are disclosed. That conviction, as will be seen in the report, was reversed because a new trial should have been granted by the court below on an application based on the newly discovered evidence of W. T. Drennan.

At the second trial, from the result of which the present appeal is taken, Drennan appeared and testified for the defence. He stated that he, driving a wagon loaded with cotton, was coming along the public road in the direction of the store-house at which the homicide occurred, and from a distance between one hundred and fifty and three hundred yards east of the store-house he saw two men near its north-east corner. Though too distant to hear what they said, their actions indicated to him that there was a fuss between them. One of them, who seemed to be advancing on the other, was making gestures, and the other was "backing." Witness's cotton was slipping, and he turned his head to see about it, and then heard the report of a

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gun ; and as he looked again, he saw the man who had been "backing" go towards his horse. According to the witness, this man had given back between five and twenty feet. Witness passed on by the store-house, at a distance from it of from twenty to fifty yards, but saw nobody lying on the ground, nor any one taken up from the ground. On cross-examination, he stated his distance from the store-house to have been from two hundred yards to a quarter of a mile when he observed the two men of whom he spoke. As will be seen by the report in 2 Texas Ct. App., the retreating party must have been the appellant.

In rebuttal of Drennan's evidence, the prosecution recalled the witness Lyons, who stated that he observed the appellant for a quarter of a mile as he rode off in an eastwardly direction, but saw no wagon at all.

In the opinion of the court the substance of Montgomery's dying declaration will be found. An amended motion for a new trial was filed in the court below, alleging separation of the jury while the trial was in progress, and supported by the affidavit of one of the jury, who, however, did not depose that any of the jurors held any communication with other persons. In resistance of the motion, the prosecution filed the affidavits of another juror and of the bailiff in charge of the jury, who deposed that no such communication was or could have been had.

Other matters of fact germane to the rulings of this court will be found in the opinion. The district judge having been of counsel, the trial below was had before a special judge.

Stemmons & Hurt, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The indictment upon which the appellant was tried charges him with the murder of one Robert Montgomery, averred to have been committed in Dallas County,

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by a mortal wound inflicted on October 1, 1872, and which resulted in death on the third day of the same month. On a trial of the case, which occurred on March 13, 1879, in the District Court of Dallas County, the accused was convicted of murder in the second degree, his punishment being assessed by the jury at five years' confinement in the State penitentiary; and judgment was entered in accordance with the verdict. A motion and an amended motion for a new trial were made, which were overruled on May 8, 1879, and sentence was passed upon the defendant, corresponding in terms with the verdict and judgment; and from the judgment of the District Court this appeal is prosecuted.

Four bills of exception were taken to the rulings of the court below during the progress of the trial. The first calls in question the manner of forming the jury for the trial, two others relate to rulings of the court upon the testimony, and the fourth calls in question the action of the court in passing sentence upon the defendant after a motion for a new trial had been overruled and notice of appeal had been given. The assignments of error embrace the four matters set out in the bills of exception, and besides these the following in addition, to wit: There was error in the charge given by the court below to the jury, in this, that in the second paragraph of the charge the court unnecessarily and emphatically impressed upon the jury, as matter of fact, that the defendant had at a previous term of the court been convicted of murder in the second degree, there being no evidence before the jury to that effect; and that the court below erred in overruling the defendant's motion for a new trial.

The circumstances immediately attending the homicide may be stated briefly as follows: On the day of the difficulty, West, the accused, and Montgomery, the deceased, met at a country store, and were sitting outside the house with others, conversing on indifferent subjects, and appar-

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ently in a friendly manner for a time, when Montgomery was called to his dinner, and then the defendant invited Montgomery aside for a private interview. They passed from the view of the by-standers, going round a corner of the store-house, and soon after were heard talking as if in an angry altercation, followed by the report of a pistol-shot. The defendant was seen to step back, raise his pistol in both hands, and fire; and going to his horse, which was hitched to a rack near by, mounted and rode away. Montgomery was found near the house, shot above the hip, and about the waist of the pants, on the left side, — “just above the hip, a little in front, ranging down,” says one of the medical witnesses. The wound appears to have been inflicted on the first and death resulted therefrom on the third day of the month. Testimony was adduced in order to establish the state of feeling between the parties previous to and at the time of the *rencontre*.

To return to the bills of exception and the assignments of error. The matter complained of in the defendant's first bill of exceptions and in the corresponding error assigned is, as gathered from the bill of exceptions, as follows: Twenty-four jurors were placed in the jury-box, and sworn to answer questions touching their qualifications as jurors; the county attorney challenged three for cause, and announced that he did not wish to make any fourth challenge for cause. The court then asked the defendant's counsel if they wished to make any challenge for cause; whereupon the defendant's counsel requested the court to have the places of those challenged filled with talesmen. The box being exhausted, the court refused; and the refusal of the court to fill up the panel to the original number is the error complained of, and counsel cite sect. 22 of the jury-law of 1876. Gen. Laws 1876, p. 82. That part of the section cited and which is applicable to the question is as follows: “In all cases of jury-trial, the clerk shall draw from the box the names of twenty-four jurors, if in the

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District Court, or so many as there may be if there be a less number in the box. * * * But before either party shall be required to strike, those on the list shall be challenged for cause, and others drawn, and placed as drawn upon the list, in place of as many as may be set aside for cause.”

The question here raised is identical with one decided by this court in *Speiden v. The State*, 3 Texas Ct. App. 156, where (quoting from the syllabus) it was held that, “where there was no residuum from which to supply the places of regular jurors challenged for cause, the court below correctly required the accused to pass upon those in the panel, and then had the panel filled by summoning qualified persons.” It is manifestly the intention of the jury-law to provide for supplying the courts at each term with a sufficient number of jurors for the term, and that the jurors so furnished shall be made available so far as practicable, without calling on citizens generally to perform jury-service who had not been designated for that purpose in the manner provided by law.

In the present case it appears that the jury-box had been exhausted, and that there were no more names remaining in it from which to supply the places of those who had been set aside for cause; and therefore the court did not err in refusing to fill the panel to twenty-four before requiring the defendant to pass upon the twenty-one remaining. It does not appear that the defendant exhausted his peremptory challenges, or that any injury resulted to the defendant, or that the intent of the law has been violated by the action of the court.

The subject of complaint mentioned in bill of exceptions No. 2 is as follows: The county attorney proposed to prove by a witness that the deceased, in his dying declaration, stated that he never had insulted the mother of the defendant; which was objected to on the ground that said evidence constituted no part of the transaction attending the killing.

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The objection was overruled, the witness permitted to testify, and the defendant took a bill of exceptions to the ruling.

It does not appear that any question was raised as to the admission in evidence of the statements made by the deceased prior to his death, as to the manner in which he came to his death, or as to whether the proper predicate had been laid for its introduction. The only question is that the statement made was not admissible as a dying declaration. In order to see to what the objection relates, we set out so much of the testimony of the witness as is necessary for that purpose. He says: "I saw that he thought he would die. He told me the circumstances of the shooting; he said he was going to die, and was satisfied he would not recover; said this several times immediately after the shooting, and also after Dr. Ford got there. He said West shot him. He said Wallace came to the store and talked with him half an hour. As he was in the act of going to dinner, Wallace (defendant) called him around the house and charged him with insulting his mother; which he denied. In this interview he told me he had not insulted his mother," etc.

On the question as to what class of cases dying declarations are admissible in, it was formerly held they were admissible in a much greater number of inquiries than at present. Says Mr. Greenleaf (1 Greenl. on Ev., sect. 156): "It was at one time held by respectable authorities that this principle [that is, the statement of the situation of the declarant] warranted the admission of dying declarations in all cases, civil and criminal; but it is now well settled that they are admissible, as such, only in cases of homicide, 'where the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declarations.'" So says Roscoe's Cr. Ev., sect. 1. It is a general rule that dying declarations, though made with a full consciousness of approaching death, are only

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admissible in evidence when the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. These common-law rules are embodied in the Texas Code of Criminal Procedure, art. 748, in language of similar import, to wit: "The dying declarations of a deceased person may be offered in evidence either for or against a defendant charged with the homicide of such deceased person, under the restrictions hereinafter provided."

If the question of the admissibility of this testimony were to be tested alone by the bill of exceptions, and passed on as there stated, we fail to see that the portion of the witness's statement as to what the deceased said as to the cause of the quarrel can be said to be a statement of the circumstances of the death. Yet, when taken in connection with the rest of the statement, we are of opinion the objectionable portion was so intimately interwoven with the thread of the narrative that it could not be separated without marring if not destroying the sense; and taking this in connection with the other testimony bearing on the same subject, and which was admitted without apparent objection, we are unable to see that the error, if any, was material.

Bill of exceptions No. 3 recites that the defendant introduced a witness by whom he proposed to prove that the witness saw the defendant a mile or a mile and a half from the place of the killing, on the evening of the same day of the killing and after the killing, and that the defendant had a "fresh cut" on the lapel of his coat, about three inches long. This testimony was excluded, on objection by the counsel for the State. Both as to the place, the distance from the scene of the homicide, and the uncertainty as to the time stated after the killing, we are of opinion the testimony was not admissible as any part of the transaction; and besides this, to hold that the witness should be allowed to make the proof would afford an opportunity for the

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manufacture of testimony likely to lead to dangerous consequences. There was no error in this ruling of the court. There was no error in passing sentence, as mentioned in bill of exceptions No. 4. The law in force at the time the motion for new trial was overruled authorized the proceeding. Acts 1879 (Reg. Sess.), p. 70 ; Code Cr. Pr., art. 794.

There remain to be considered the two errors assigned not covered by bills of exception. First, the charge complained of is to this effect: "The defendant, at a former term of this court, was convicted of murder in the second degree on the charge in this indictment, and a new trial was granted him by the court. The offence being one of degrees, the conviction of the defendant of a lesser degree thereof and the granting him a new trial operates as an acquittal of the higher degree of the offence. You cannot convict the defendant of murder in the first degree, and for this reason the law of express malice as applicable to murder will not be further considered or explained by the court." As already seen, there was no exception taken to this part of the charge at the time of its delivery; attention is first called to it in the motion for a new trial. In the motion for a new trial, only a portion of the charge complained of is set out. The Supreme Court, in *Bishop v. The State*, 43 Texas, 390, held that when a charge is not excepted to at the time, but is presented for the first time in the motion for a new trial, the rule is, was such error, under all the circumstances as exhibited in the record, calculated to injure the defendant?

We do not consider the charge complained of as being any portion of the instructions by which the jury were to be guided in arriving at their conclusions in making a verdict, nor do we deem it more than an attempt to withdraw from their consideration the question of murder in the first degree by informing them that the legal effect of the former trial was to acquit of that grade or degree of the offence embraced in the indictment. Whilst we are of opinion the language

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employed is not to be commended, we may reasonably conclude that the judge presiding would have made the proper modification if his attention had been called to it at the proper time. He should have informed the jury in some appropriate language that they would not consider the subject of murder in the first degree, or that they would not consider any higher grade of offence than murder in the second degree, without saying in effect that the defendant had already been once convicted of murder in the second degree. Coming as here presented, and in view of all the circumstances as exhibited in the record, we fail to discover in this any such error as was calculated to injure the rights of the defendant.

As to the motion for a new trial, the overruling of which is assigned as error, the only grounds worthy of notice are those which complain of separation by the jury during their deliberation on the case, and in the amended motion supporting the allegation of separation, by affidavits. In regard to all this, we are of opinion that the whole conduct of the jury appears to be entirely free from blame or suspicion of unfairness towards either party. It is true that by the Code of Criminal Procedure, art. 687, it is provided that after a jury has been sworn and empanelled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorneys representing the State and the defendant, and in charge of an officer; yet this rule ought not to have an unreasonable application. The rule in *Davis v. The State*, 3 Texas Ct. App. 93, is decisive of the question, to this effect: a separation of the jury before bringing in a verdict in a felony case does not, *per se*, render the verdict void, but such verdict will be set aside, or not, according to the circumstances. See the case and authorities.

Finding no such error as would warrant an interference with the verdict and judgment, the judgment of the District Court is affirmed.

Affirmed.

S. P. SMITH ET AL. v. THE STATE.

VARIANCE — SCIRE FACIAS. — A bail-bond was conditioned for the appearance of one S. before the "Criminal Court of McLennan County," but in the description of the bond in the judgment *nisi* and the *scire facias* the court was designated the "Criminal Court of Waco," in conformity with the enactment which created it. On the trial of the *scire facias*, the defendants objected to the bond as evidence, on account of the variance between it and the *scire facias*. *Held*, that the objection was well taken, and it was error to admit the bond in evidence.

APPEAL from the Criminal Court of the city of Waco.
Tried below before the Hon. N. W. BATTLE.

The opinion states the case. The judgment below was rendered prior to the abolition of the Criminal Court of Waco by the Constitution of 1876.

Herring, Anderson & Kelly, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.
This appeal is prosecuted from a final judgment on a forfeited bail-bond.

Art. 2884, Paschal's Digest, sets out what will exonerate principals and sureties from liability on bail-bonds, etc. See also *Barton v. The State*, 24 Texas, 251.

It is to be noticed that no exceptions were taken to the *scire facias* for its insufficiency in law. The parties answered by general denial and a special answer. All the law requires is that the *scire facias* shall state the facts, of which the parties are required to take notice with reasonable certainty. *The State v. Cox*, 25 Texas, 406.

As to the little descriptions in the *scire facias* differing from the bond in minutiae, this can be treated as surplusage. *The State v. Cox*, 25 Texas, 406; *Davidson v. The State*, 20 Texas, 207, 649. The main fact relied upon is that the bond binds the defendant to appear "before the Honorable Criminal Court of McLennan County, Texas, at the court-house thereof in the town of Waco," etc.; and

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the appellants say that there is no such court known to the law, — *ergo*, the judgment should not have been made final.

The act of April 10, 1874, created a criminal court for Waco, and it seems the name given to that court for McLennan County was, “*Criminal Court of Waco.*” Acts 1874, p. 110. Now the same law made all the criminal matters of McLennan County exclusively cognizable by that court; and while it was called the “*Criminal Court of Waco*” by the law, it was in fact the *Criminal Court for McLennan County*; and in obligating themselves that the defendant should appear before that court, there could be no mistake by appellants about what court was meant, because the aforesaid act fixes all the criminal business of the county in that court, and especially with the other words in the bond, — “at the court-house in Waco.”

It is known judicially that it was then the only court of criminal jurisdiction in McLennan County, and that it was in law the court before which the defendant was bound to appear, and before which the bail-bond bound him to appear. The time is stated, and the place “the court-house thereof in the town of Waco.” There was no other court which had criminal jurisdiction in McLennan County, and what the court intended is sufficiently certain to admit of no doubt. If this be true, then there can be no doubt of the correctness of the judgment. As to the certainty required, see *Hollingsworth v. Holhouson*, 17 Texas, 41.

WHITE, P. J. S. P. Smith was indicted in the District Court of McLennan County on the twenty-second day of April, 1874, for theft of cattle. He was arrested, and on the tenth day of June, 1874, executed a bail-bond for his appearance to answer said indictment, with P. P. Martin, Z. Davis, and J. Clasner as his sureties.

Two days before the indictment was found, to wit, on the twentieth day of April, 1874, an act passed by the

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Fourteenth Legislature was approved, which took effect from and after its passage, entitled "An act to establish a Criminal Court in and for the cities of Waco and Marlin, and defining the powers thereof." This act gave to the courts it established "original and exclusive jurisdiction * * * in all cases of felony, and concurrent jurisdiction in all cases of misdemeanor, coextensive with the limits of the counties wherein the said cities are situated;" and provided that "all criminal business pending in the District Courts of the counties of McLennan and Falls should be transferred to said Criminal Courts at the first term thereof in their respective counties."

It does not appear when this case was transferred from the District to the Criminal Court of the city of Waco, but on the tenth day of June, 1874, when the appearance or bail-bond was executed it was conditioned as follows, viz.: "The condition of the above obligation is such that if the said S. P. Smith, principal, will well and truly make his personal appearance before the honorable Criminal Court of McLennan County, Texas, at the court-house thereof in the town of Waco, on the first Monday in July, 1874, and there remain," etc. At the July term, 1874, of the Criminal Court of the city of Waco, Smith failing to appear, the bond was forfeited and judgment *nisi* was rendered, and *scire facias* ordered for the sureties. At the November term, 1875, the sureties answered and pleaded *non est factum*, alleging that they had never executed a bond for the appearance of their principal before "the honorable Criminal Court of Waco" as recited in the *scire facias*, but that they had executed a bond for his appearance before "the Criminal Court of McLennan County;" and that neither at the date of the said bond nor since was there any such court known to the laws of Texas as "the honorable Criminal Court of McLennan County," and that therefore they were not bound in law to appear; and they prayed that the judgment should not be made final, and that they might go hence with costs, etc.

Syllabus.

When the cause was on trial, the prosecution offered in evidence the bail-bond. To this the defendants objected because it was not the bond described in the *scire facias*; and the objections being overruled, a bill of exceptions was saved. The result of the trial was, the judgment *nisi* was made final and entered accordingly; from which judgment this appeal is taken.

The court erred in admitting in evidence the bail-bond, over objections of defendants. The variance between the *scire facias* and bond was a fatal one, and the bond did not support or coincide with the allegations in the *scire facias*. *Hedrick v. The State*, 3 Texas Ct. App. 570. Because of error committed by the lower court in the admission of testimony, the judgment is reversed and the cause remanded.

Reversed and remanded.

J. W. WILLIAMS v. THE STATE.

1. CHARGE OF THE COURT — INSANITY. — In a trial for murder, the court below instructed the jury to the effect that an act done in a state of insanity is not punishable, and that in such cases the true inquiry is whether or not the accused was capable of having, and did have, a criminal intent, and the capacity to distinguish between right and wrong, in respect of the particular act of which he is charged. *Held*, in substantial accord with the adjudications of this and other States.
2. NEWLY DISCOVERED EVIDENCE. — Being found guilty of murder, the defendant filed his affidavit for a new trial, alleging that he had discovered since his trial that he could prove by certain absent witnesses that, a few hours before the homicide, they met the deceased, who was carrying a gun, and who inquired of them for defendant, saying that if he found defendant he would "make it warm for him," and would "set him up." *Held*, that the materiality of this proof is not apparent, inasmuch as it is neither alleged in the affidavit nor disclosed in the evidence at the trial that such threats of the deceased had been communicated to the defendant, or that the deceased, when shot by the defendant, was making any manner of hostile demonstration.
3. SAME. — Nor would newly discovered evidence to prove a criminal intimacy between the deceased and the wife of the defendant be material, without

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further proof that such intimacy came to the defendant's knowledge, and that immediately thereupon he sought the deceased and killed him.

4. **APPLICATION** for new trial based on newly discovered evidence must allege that such evidence was unknown to the defendant at the time of the trial, and not merely that it was unknown to his counsel; and if the supporting affiants allege information derived from other persons, the names of such others should be disclosed, and their affidavits be either filed or the want of them accounted for.
5. **PRACTICE IN COURT OF APPEALS.** — This court cannot hold the refusal of a new trial to be error, when the motion therefor failed to comply with essential requirements of the law.
6. **VERDICT.** — The Code directs that verdicts shall be entered on the minutes of the court, but does not require the clerk to mark them "filed."

APPEAL from the District Court of Bastrop. Tried below before the Hon. L. W. MOORE.

The indictment charged that the appellant, on September 27, 1878, did, in the county of Bastrop, with malice aforethought, kill and murder one Frank Strickland by shooting him with a gun.

It appears by the evidence that Strickland lived with John Holligan in Bastrop County, and that about one o'clock on the day alleged in the indictment he was shot down and instantly killed by the defendant, at Holligan's gate and about ten steps from the door of the house. Holligan, his wife, and another witness were in the house, and, hearing the report of a gun, instantly looked out and saw the defendant, within ten feet of the deceased, take his gun from his shoulder and walk off, increasing his gait to a run at a little distance. The deceased was lying on the ground, dead, having received two buckshot in the head. No words were heard to pass between deceased and defendant. The deceased, when shot, was leading his horse from the horse-lot to the gate.

John Jenkins, for the State, testified that about noon on the day Strickland was killed the appellant came to witness's house and bought a double-barrelled shot-gun from witness, stating that he wanted it loaded. Appellant began

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to load the gun, but seemed so awkward about it that witness loaded it himself. He asked the appellant what kind of shot he wished the gun loaded with; to which the appellant replied that he wanted it loaded with buckshot. Witness charged each barrel with twelve buckshot, and put caps on the tubes. In about half an hour the appellant left, taking the direction of John Holligan's house, which was about a mile distant.

The defence introduced Mary Jane Williams, the wife of the appellant. She stated that they had been married for about six months before Strickland was killed, and for about a month prior to that event they lived on Mr. Webber's premises. The deceased never visited their house more than three times; but the appellant, without cause, became jealous, and told witness there was something wrong between her and Strickland, and he did not want Strickland to visit there any more. On various occasions the appellant would imagine that he heard a noise on the outside of the house, and would jump up, get his gun, and run out. Witness would tell him there was nothing the matter, but he would insist that something was after him and trying to come about his house. At times he would seem to be friendly, and in a moment, without cause, would become enraged and seem perfectly frantic, and charge witness with infidelity with the deceased. On these occasions he exhibited the conduct of a madman. Witness could not under such circumstances continue to live with him, and on the morning of the day of the homicide she went over to the house of John Holligan, who was her uncle, and with whom the deceased was then living. Witness's father lived within a few hundred yards of her uncle's. She stated she could not like a man who had treated her as appellant had, and she retained no good feelings for him. She could not say that the appellant was insane; but thought he was not, and that he knew what he was doing.

Ed. Weaver, a witness for the defence, had known the

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appellant well, prior to the homicide, and had often met him. Appellant's conversation was scattering and his language and ideas incoherent, and witness came to the conclusion that he was laboring under some mental disorder. Appellant's conduct and language always impressed witness with the belief that something was wrong with the appellant, and that his mind was in some way diseased. On cross-examination, however, the witness would not say that the appellant was incapable of judging between right and wrong. Witness believed that the appellant knew what was an offence, and that it was an offence to murder.

Frank Yoast, also for the defence, had known the appellant before the homicide, and from his manner and conversation believed that his mind was diseased. Two or three days after the homicide, the appellant came to where the witness then was, and said he wanted "to give up and go to town." Witness sent the appellant to his (the witness's) house to stay, and the next morning witness, on returning home, found him there. He asked witness to come to town with him. On their way to town the appellant hallooed and yelled at everybody he saw; his conversation, manner, and conduct were not that of a sane man. But, on cross-examination, the witness thought the appellant knew right from wrong, and that it was wrong to kill a man.

Jesse Halcum, for the defence, stated that he and the appellant had worked together for a short period, some time before the homicide. Witness instanced singular acts and behavior of the appellant, and thought his conduct very strange. On cross-examination, the witness said that it had not occurred to him that the appellant's mind was affected.

The State, in rebuttal, introduced four witnesses whose opportunities had been good for observing the conduct and mental condition of the appellant for several months previous to the homicide. They concurred in pronouncing him a man of ordinary good sense, and had seen nothing to indicate an unsound condition of his mental faculties. For

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four weeks immediately before the killing of Strickland, the appellant and his wife picked cotton for one of these witnesses, Mr. Webber, who testified that he had not observed any thing the matter with the appellant's mind. On the morning of the day of the homicide, witness moved the appellant's wife over to her uncle's; and on his return home, about ten in the forenoon, he had a settlement with the appellant, who had kept an exact account of the cotton picked by himself and his wife. The appellant and witness's son made the necessary calculations to ascertain the amount due appellant. Witness then paid appellant what was due him, and he left witness's place, which is somewhat between Jenkins's and John Holligan's, and about half a mile from the latter.

This concluded the evidence. All other matters appear in the opinion.

R. C. Stafford, for the appellant.

Thomas Ball, Assistant Attorney-General, and *W. B. Dunham*, for the State.

CLARK, J. Appellant was convicted of the murder of one Frank Strickland, and his punishment assessed at death. On the trial of the cause there was evidence tending to show a disordered state of the mind on his part, before the killing, and the issue of his sanity at the time of the homicide was submitted to the jury in the charge of the court.

The charge upon this point was substantially to the effect that an act, otherwise criminal, done and performed in a state of insanity is not punishable; but the true inquiry should be whether or not the accused was capable of having, and did have, a criminal intent. If he had such intent, he was punishable, otherwise not, — the true test being the capacity to distinguish between right and wrong as to the

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particular act with which he is charged. We deem this instruction in substantial accord with established precedents, both in our own and other States. *Webb v. The State*, 5 Texas Ct. App. 607, and authorities there cited.

After his conviction, appellant moved for a new trial, basing his application, among other grounds, upon alleged newly discovered evidence. His own affidavit was appended to and in support of the motion, in which it is averred that since the trial of the case he has been informed that he could prove by two parties, whose names are given, who resided near the scene of the homicide, but both of whom were temporarily absent from the county, that on the day of and some hours before the difficulty they met the deceased, armed with a double-barrelled gun, who inquired of them for appellant, and stated that if he found him "he [deceased] would make it warm for him;" that appellant had been in his way for some time, and that he (deceased) had succeeded in parting appellant and his wife, and "that he intended to set him up."

Appended to the motion appears also an affidavit of appellant's counsel to the effect that the affiant was acquainted with the absent witnesses, and that their whereabouts is not known, and it was impracticable to obtain their affidavits in support of the motion. This affidavit further states that since the trial of the cause the affiant was informed that one Weaver, who testified for appellant on the trial, had stated after the trial that he knew facts that, if testified to, would have secured appellant's acquittal; that he (witness) had witnessed improper intimacies between the deceased and the wife of appellant, at the house of witness, anterior to the killing; and that this was not known to the affiant until since the trial.

If proper diligence had been shown in the supporting affidavits, which we think was not done, they are wholly insufficient in that the names of the informants were not furnished to the court, nor are their affidavits produced or

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accounted for in any manner. In view of the evidence adduced upon the trial, we fail to perceive the materiality of the testimony. This evidence shows a deliberate preparation on the part of appellant to take the life of the deceased, which was executed with equal deliberation and coolness. There is nothing in the record tending to show communication of these threats, or that the appellant acted upon them; nor does any thing appear in the motion for new trial showing an ability or even a disposition to supply this evidence. No act seems to have been done or attempted by the deceased, at the time of the homicide, manifesting an intention to carry a previous threat, if such was made, into execution; nor does it appear that the deceased did any act, at the time of the killing, which could show any hostile intention whatsoever toward appellant.

The affidavit of appellant's attorney fails to negative the fact that appellant was informed of what the witness Weaver could testify, before the trial; and the facts stated in said affidavit, when viewed in the light of the testimony, are believed to be alike immaterial. If improper intimacy existed between the deceased and appellant's wife, it does not appear that such intimacy was discovered by appellant, or that, immediately upon such discovery, appellant sought out the invader of his home and slew him. Under our provisions of law this was requisite to reduce the homicide below the grade of murder. *Pasc. Dig.*, art. 2254; *Sanchez v. The People*, 22 N. Y. 147. Indeed, there is no evidence before us which tends to show the existence of any such relation, but only a suspicion upon the part of appellant to that effect, long entertained; but whether well founded or baseless, we cannot say from the record before us.

The motion for new trial failing to comply in essential particulars with the requisites of the law, this court cannot say that the court below erred in refusing a new trial. *Yanez v. The State*, 6 Texas Ct. App. 429; *Polser v. The*

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State, 6 Texas Ct. App. 510; *Evans v. The State*, 6 Texas Ct. App. 513; *Tuttle v. The State*, 6 Texas Ct. App. 556; *Hasselmeyer v. The State*, 6 Texas Ct. App. 21; *Tooney v. The State*, 5 Texas Ct. App. 163; *Templeton v. The State*, 5 Texas Ct. App. 398.

It is complained that the verdict, after its return by the jury, was not marked "filed" by the clerk, as required by law. We know of no provision of law that requires this to be done, nor has any such provision been pointed out to us by counsel. The statute only requires that it be entered upon the minutes of the court, which was done in this case. Pasc. Dig., art. 3088.

This case has received at our hands the most careful consideration and scrutiny, not alone because the life of a fellow-being was involved in the issue, but because appellant claims to have been surrounded by circumstances at the time of the homicide which appeal most strongly to the sympathies of every English-speaking person. Whatever may have been the provocation of appellant, the duty of this court in passing upon any criminal case is confined to the questions of law and fact apparent upon the record sent up to us. The law has wisely vested a wide discretion in the judges who preside at trials, and who become personally cognizant of many phases in the course of the trial which cannot appear to this court upon the pages of a record. An abuse of this discretion, if made to appear to this court, is susceptible of revision here; but in the absence of such showing, our duty is so plainly marked out that we cannot avoid it if we would.

Looking to the record, we fail to perceive any error of the court throughout the progress of the trial. The appellant was defended by counsel, and before a jury of his own selection. The prosecution was based upon an indictment sufficient in all legal requisites. The charge of the court distinctly sets forth the law applicable to the case, and the verdict is fully supported by the testimony. No error is

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made to appear in any of the rulings on the trial, and the conviction is in all respects valid. We have no alternative, therefore, but to affirm the judgment, which is accordingly done.

Affirmed.

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N. ENGLISH v. THE STATE.

1. **ELECTION-LAW.** — Sect. 21 of the “act regulating elections,” approved August 23, 1876, is not obnoxious to art. 111, sect. 35, of the Constitution, which requires that an act shall not embrace more than one subject and that it be expressed in the title. Said sect. 21 relates to the closing of liquor-shops during the day of any election, by order of the judges of election, and also imposes penalties on vendors of liquors in violation of its prohibitions. These provisions were enacted to secure citizens in peaceable exercise of their right of suffrage, and cannot be deemed out of place in an act “regulating elections.”
2. **SAME.** — The authority conferred on the judges of elections to close liquor-shops on election-days by no means implies that they, or any other officials, can legally permit such establishments to be kept open in disregard of the law. Such a permission would be nugatory, and proof of it is incompetent.
3. **CONSTRUCTION OF STATUTES.** — A general law of 1875 authorized any city in the State, “by a two-thirds vote of the city council of such city,” to accept the provisions of the said general law in lieu of its then existing charter. *Held*, that a “two-thirds vote of the city council” signifies a two-thirds vote of a *quorum* of the council present and voting.

APPEAL from the County Court of Lamar. Tried below before the Hon. S. C. BRYSON, County Judge.

F. W. Miner, for the appellant.

Thomas Bull, Assistant Attorney-General, for the State.

CLARK, J. It is contended that sect. 21 of “An act regulating elections,” approved August 23, 1876 (Gen. Laws 1876, chap. 166), comes within the inhibition of art. 3, sect. 35, of our State Constitution, in that it embraces a subject not expressed in the title. This section relates to

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the closing of liquor-shops on the day of any election for municipal, county, district, or State officers, and forbids the sale of liquor on any such day except by druggists on regular prescription, or by wholesale dealers for shipment beyond the limits of the county.

The purpose of the section is obvious. Contemplating the excitement incident to popular elections, and their tendency to beget affrays and disturbances of the peace, the Legislature wisely prescribed that on those days the citizen should not have indiscriminate access to places where intoxicating liquors were sold, but that such places should be closed and no sales of liquor be made except under certain guarded instructions. It may be said with safety that nothing is more essential to the fairness and purity of elections than that perfect peace and quiet should prevail in the vicinity of the polling-places, and that in the exercise of that right upon which rests our whole superstructure of government — Federal, State, and municipal — the citizen shall not be subjected to annoyance or intimidation from any source. It is one of the highest duties of the State to preserve the peace at elections, in order that the sovereign will may be duly expressed and registered ; and any provision of law having for its object the subservience of this end certainly cannot be out of place in an act regulating elections. The exception to the indictment on this ground was properly overruled.

It is hardly necessary to say that, under the section referred to, no officer — State, county, or municipal — is invested with authority to grant permission to any one for the sale of liquors on any day of election. It is true, judges of election may require sheriffs, constables, or special constables to close up any establishment for the sale of liquor, but this by no means implies that such establishments may keep open until closed by one of these officers. The law imperatively requires that such establishments shall be kept closed upon election-days, and so imperative are its behests

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that it does not content itself with the infliction of penalties for a disregard of its mandates, as in ordinary offences, but authorizes judges of election to use the officers of the county, and, if necessary, the power of the county, to summarily close such establishments, even though the owner may disregard the law and wilfully subject himself to the penalty. The evidence offered by appellant tending to show the consent of the mayor of Paris that appellant should keep open his saloon on the day of election, and for which he stands indicted, was properly rejected by the court below.

It is argued that the evidence discloses that the city of Paris, the place where the intoxicating liquor was sold during the day of election for municipal officers, had abandoned its charter granted by the special act of 1870, and had failed to organize under the general law according to its provisions (Gen. Laws 1875, chap. 100), and therefore did not constitute a municipal corporation of this State on the second day of April, 1878, the day on which the liquor was alleged to have been sold. The argument is based upon the certified copy of the municipal journal, filed and recorded in the office of the county clerk of Lamar County in pursuance of the provisions of sect. 1 of the act last cited, which shows that in the municipal council, upon a proposition to abandon the special charter of the city and to organize under the general law, four aldermen voted in the affirmative and two in the negative. It is now contended that under the original special charter of 1870 the city council was composed of the mayor and six aldermen, and that the record discloses that two-thirds of the council failed to vote affirmatively upon the proposition.

Waiving a discussion of the right of appellant to raise that issue in this prosecution, or the right and duty of this court to take judicial notice of the municipal subdivisions of the State, it will suffice for the proper disposition of the question to say that sect. 1 of the act of March 15,

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1875, does not require an affirmative two-thirds vote of all the members elected to a city council to perfect its organization under the general law, but only a two-thirds vote of the council. The general current of authorities hold this to signify a two-thirds vote of a quorum, present and voting. Cooley's Const. Lim. 141. The record before us shows the adoption of the proposition by a two-thirds vote of the city council, present and voting.

There is no error in the judgment, and it is affirmed.

Affirmed.

H. STUCKEY v. THE STATE.

CHARGE OF THE COURT. — The law of Texas is and has ever been sedulously careful to establish and preserve well-defined boundaries between the functions of the judge and those of the jury, and to guard the province of each against intrusion by the other. It requires the judge to deliver to the jury a written charge distinctly setting forth the "law applicable to the case," but strictly enjoins him from therein discussing the facts, weighing the evidence, summing up the testimony, or using any argument calculated to arouse the sympathy or passion of the jury. These injunctions exact from the judge, not merely that he refrain from positive expressions of the prohibited kinds, but that he avoid even the appearance of an intimation or the suggestion of the remotest inference from the evidence or the facts of the case on trial. Disregard of the law in these respects becomes especially material and prejudicial when, as in the present case, there was evidence which, if credited by the jury, tended to countervail the inculpatory evidence adduced by the State. See the opinion *in extenso*, and the application of these principles in this case.

APPEAL from the District Court of Rains. Tried below before the Hon. G. J. CLARK.

The appellant was indicted for the theft of a certain mare, worth \$40 and belonging to one James Pope, in the county of Rains, on June 4, 1878. The trial resulted in a verdict finding the appellant guilty, and assessing his punishment at five years' confinement in the penitentiary.

James Pope, the principal witness for the State, testified

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that at the time charged in the indictment, and for two years anterior thereto, he was the owner of an unbranded bay mare pony, which, about May or June, 1878, was running on the range some six miles from his house and in the county of Rains. In May or June, 1878, he missed her from the range and commenced looking for her. In his search for her he came to appellant's house, and, describing the animal to him, asked if he had seen such a mare. He said he had not. Witness left, and when he got to appellant's lot he saw his mare in the lot. Calling to the appellant, witness told him that the mare in the lot looked like the one he was looking for. They then went into the lot, and witness at once recognized the mare as his, and so told the appellant, who said he was sorry then that he had branded her, and that he had a mortgage on her, and would get the mortgage and show it to witness, who told him he did not care to see the mortgage, — that the mare was his, and was all he wanted. Appellant gave the mare up to witness, who took her home. When he found her in the appellant's lot, she was fresh-branded "JC" on the right-shoulder. The brand looked like it had not been done more than a week. Witness had given no consent for the defendant or any one to take his mare. When he claimed her, the defendant did not object to giving her up.

David Spicer, for the State, testified that a week or two before Pope got the mare from the defendant, witness helped the defendant pen and catch her. Defendant told witness that the mare was his, — that he had bought her of Rosa McCrury. Witness knew a bay pony that the McCrury women used to ride; it was a gentle pony, and a lighter bay than the one caught by defendant and witness. Witness looked for a brand, but could see none, and so told defendant, who then examined, and said he had found one on the right shoulder, and took his knife and traced it, marking out "JJ." Witness then thought he could dis-

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tinguish a brand, but a very faint one if any. The pony was wild ; they had to rope it before they could examine it.

This was the evidence for the State.

R. Robbins, for the defence, stated that he knew the McCrury pony, and saw the defendant hunting for it in May or June, 1878. Defendant described it to witness, who told him he had seen pretty much such a pony on the range, along with the Robbins stock of horses. Defendant and witness went together to look for the pony, and found it along with one of the horses, but they were so wild that they could not be approached close enough to examine the pony. Defendant said that was the pony he was looking for. About a week afterwards the defendant was riding the same pony at the mill in Emory. It then had upon the right shoulder a brand with two J's, one of them reversed, thus, "JL." It was plain and fresh ; the burn from the branding-iron had not healed. This was only about a week before Pope took the pony away from the defendant. The McCrury women moved away from the county in 1876.

Virgil Gill, for the defence, testified that the defendant claimed to have purchased a bay mare pony from Mrs. McCrury, and he and witness hunted for it about the last of May, 1878. Witness knew the McCrury pony, and he and defendant finally came up with one which suited its description. When they came up with the pony in the woods, witness told defendant it was the McCrury pony, and they drove it to the defendant's house, a mile or so distant. Defendant rode the pony the next day to town and to mill. If it was not the McCrury pony, which witness had frequently seen, it resembled it very much in both size and color ; and witness told the defendant that he (witness) would take it for the McCrury pony every time.

R. W. Spradling, for the defence, testified that he loaned his wagon and team, on one occasion, to the defendant for the purpose of taking Mrs. McCrury to Wood County.

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She agreed to give the defendant a ten-dollar interest in a pony to take her, and he did so in witness's wagon.

William Bridges, for the defence, stated that in March or April, 1878, he heard Mrs. McCrury offer the defendant \$10 to carry her home to Wood County, and propose to secure it by a mortgage on a bay mare pony which was running on the range near her former home. Defendant agreed to her offer, and went with her and a lawyer named C. A. Kirby to the latter's office, to draw up the mortgage. Defendant borrowed Spradling's wagon and team, and carried Mrs. McCrury away in it. Witness knew the pony she had owned in this county, and saw the pony claimed by Pope, and thought the latter exactly like the other.

In rebuttal, the State introduced Horace Martin, Esq., who testified that he had known C. A. Kirby in the latter's lifetime, and attended his funeral, in November, 1877, several months prior to the time referred to by the preceding witness.

C. H. Yoakum, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. It has ever been the aim and purpose of our law to separate with distinct and well-defined boundaries the respective provinces of the judge and jury, and to guard with sedulous care against all invasions by the one upon the province of the other. This principle had become firmly established in our system of jurisprudence before the adoption of the Codes, and it was securely perpetuated among their many other salutary provisions.

The judge is required, after the argument of a criminal cause is concluded, to deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case, but he shall not express any opinion as to the weight of the evidence, nor shall he sum up the testimony;

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and it is further provided that it is beyond his province to discuss the facts, or use any argument in his charge calculated to arouse the sympathy or excite the passion of the jury. It is his duty to state plainly the law of the case. Code Cr. Proc., arts. 594, 595.

A charge is unexceptionable only when it states plainly and succinctly the law of the case, and any departure from this plain rule is liable to just criticism and oftentimes constitutes material error. The measure of the law is not filled by mere abstinence of the judge from any positive expression as to the weight of the evidence, or his refraining from a positive discussion of the facts. The spirit of the law requires of him to avoid even the appearance of an intimation as to the facts, and to so guard the language of his charge that no inference, however remote or obscure, may be drawn by the jury as to the facts in evidence from the charge as given them, which is made the law of the case.

Says Judge Roberts, in *Brown v. The State*, in discussing these provisions: "Language can hardly be more emphatic in separating and defining the respective provinces of the judge and of the jury. The restrictions imposed on the judge show that it was the intention of the Legislature to prevent the jury from being influenced in any way by the opinion of the judge, however communicated, as to what facts are proved, and as to the proper weight to be attached respectively to those facts, or any of them. * * * A charge, therefore, which extends beyond a plain statement of the *law* of the case, as required by the Code, may invade the province of the jury, the full and independent exercise of which has been so plainly and earnestly sought to be protected by the Legislature." 23 Texas, 201.

To the same effect is the language of Judge Bell in *Ross v. The State*: "The line which separates the province of the judge from that of the jury is oftentimes shadowy, and difficult to be traced. But, inasmuch as the Legislature has committed to the jury the right to exercise their indepen-

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dent and unbiased judgment in determining upon facts, and has denied to the judge the right to comment upon the facts in evidence, the court should exercise the greatest care in framing instructions to juries, so as not to violate, in the least degree, the spirit of the law upon this subject.” 29 Texas, 501.

Tested by these well-established rules, the charge in this case is not free from objection. The evidence for the prosecution tended to show that the defendant took the mare which he is charged with stealing from off the range near his home, placed a brand upon it, and that it was not his animal, but belonged to the owner alleged in the indictment. On the contrary, the evidence in defence tended to show that the taking was open, in the presence of another person, and done under a claim of ownership. The evidence being so evenly balanced, it was of material importance to the rights of defendant that the jury should be left to determine the facts, under the law, without any intimation from the court as to the guilt or innocence of the person on trial, or any expression from the court from which the jury could infer that the court had any opinion upon the facts.

The court instructed the jury upon four hypotheses leading to the conclusion of defendant's guilt, and upon one hypothesis from which they might deduce his innocence, and concluded his charge with a brief summary as to both conclusions. In the course of the charge, he informs the jury that “a man may steal in broad daylight, and in the presence of all his neighbors, as much so as in the night or in secret, but the manner of taking and using property may be considered by the jury in determining the intent of the defendant.” And in the conclusion, the charge particularly prescribes the exact form of the verdict in case the jury should find the defendant guilty, but fails to tell them what they should do in case they should conclude that he was not guilty.

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Whether or not the proposition that a man may steal in broad daylight, in the presence of all his neighbors, is correct in the abstract, we are of opinion that in this case it should have been omitted, and that its incorporation in the charge was prejudicial to the rights of the defendant. We are further of the opinion that the spirit, tenor, and effect of the charge as a whole were equally prejudicial, and that it tended to convey, by necessary inference, an impression upon the part of the court that the defendant was not innocent, and that the jury were not likely to reach that conclusion. In so far as the charge presents the issues arising upon the facts to the jury, it is not open to objection; but the court should have contented itself with a clear and simple presentation of those issues, leaving the jury free to exercise their intelligent judgment in the application of the law to the facts.

We deem it proper to add that, under the operation of our present admirable jury-system, the virtue and intelligence of the several counties are usually found in the jury-boxes, and trial judges need have no solicitude as to a proper discharge of their functions under the law. Instances are not likely often to occur wherein jurors will mistake their duties under the law, when the law applicable to the case has been plainly given them in the charge of the court.

Because of error in the charge, the judgment is reversed and the cause remanded.

Reversed and remanded.

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B. F. O'BRIEN v. THE STATE.

1. **BRIBERY.** — *O'Brien v. The State*, 6 Texas Ct. App. 665, cited and approved, to the effect that if an officer first suggests his willingness to accept a bribe, and thereby originates the criminal intent, the defendant, by acceding, does not commit bribery under art. 307 of the Penal Code. Rev. Penal Code, art. 133.
2. **SAME — CHARGE OF THE COURT.** — But it was not error to instruct that, if the defendant offered to bribe the officer, no subsequent conduct of the officer could exculpate the defendant.

APPEAL from the District Court of Hunt. Tried below before the Hon. G. J. CLARK.

This appeal results from a retrial of the case reported in 6 Texas Ct. App. 665, where the material facts will be found in the opinion of the court reversing the judgment from which that appeal was taken. The second trial was had at the July term, 1879, of the court below, and resulted in a verdict of guilty and an assessment of two years in the penitentiary. The opinion now reported sets out in full the instruction assigned as error, and discloses all other features worthy of notice.

No brief for the appellant has reached the reporters

Thomas Ball, Assistant Attorney-General, and *E. W. Terhune*, for the State.

CLARK, J. Appellant was convicted in the District Court of Hunt County, at its January term, 1879, for an offer to bribe the deputy-sheriff and jailer of said county to permit a prisoner in his custody to escape; and on appeal to our Austin term, 1879, the judgment of conviction was reversed because of error of the court in instructing the jury that if the defendant offered the bribe he would be guilty under the law although the officer had before that time offered or agreed to accept a bribe. See *O'Brien v. The State*, 6

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Texas Ct. App. 665. Upon his second conviction, he again prosecuted his appeal, assigning for error the error of the court in giving and refusing instructions, and the insufficiency of the evidence.

That portion of the charge complained of is as follows: "But if the jury believe from the evidence that the defendant first offered the jailer any money, or other thing of value, for the purpose of inducing and influencing the jailer to permit Williams to escape from the jail, then the defendant would be guilty of offering a bribe; and this would be the case whatever may have been the conduct or actions of the officer after the offering of the bribe." This charge is excepted to because (as is alleged) it assumes that a bribe was offered, and makes the guilt of the defendant depend upon who first made the offer; and because it told the jury, in effect, that even had the officer agreed to accept the bribe from the prisoner in jail, whose escape was desired, and the prisoner had furnished the money to defendant, who then made the offer, that this was the first offer.

The charge is in accordance with the views expressed by this court on the former appeal; and no authorities have been furnished us which require or justify a modification of the rule as then laid down. A careful examination of the statement of facts fails to reveal any thing tending to show that the officer to whom the bribe is charged to have been offered ever agreed to accept a bribe from any one, or that the prisoner in his custody, or any one for him, had furnished the defendant with money to be offered to the officer in pursuance of his previous acceptance. The instruction, therefore, apart from being the law applicable to the case, could not have misled the jury, in view of the evidence before them.

The instructions asked by appellant and refused by the court seem to have been the identical instructions asked on the former trial, and which were held by this court, on the former appeal, to have been properly refused. We find

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no change in the evidence which would justify us in holding their refusal on the second trial as erroneous. The modification in the instruction asked and given was proper, in view of the fact that the portion expunged was already substantially given in the main charge.

The evidence clearly shows an offer to bribe an officer to permit a prisoner in his custody, charged with a grave felony, to escape, and nothing is shown by appellant tending in any degree to explain or justify his conduct.

The judgment is affirmed.

Affirmed.

J. H. HORAN ET AL. v. THE STATE.

PREVENTING EXECUTION OF CIVIL PROCESS — RESISTING OFFICER IN EXECUTING SUCH PROCESS. — Indictment charged the appellants in one count with the offence of preventing or defeating execution of civil process, as defined in the Penal Code, art. 327, and in a second count with the offence of resisting or opposing an officer in the execution of such process, as defined in the Penal Code, art. 338. Neither count averred the particular mode by which the offence was committed, nor alleged that the appellants knew the capacity in which the officer was acting. *Held*, that without these averments the indictment is fatally defective in substance, and the cause is dismissed. *Quære*: Was it necessary that the indictment should have set out the process *in hæc verba*? See the opinion in full on these questions.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. NOONAN.

The opinion sets out so much of the indictment as subserves all purposes. J. H. Horan, Roy Bean, and Bethel Coopwood were the defendants. The record shows that they claimed to have acted under authority of a writ of possession which emanated from the United States Circuit Court at Austin, of which Horan was a deputy-marshal. The jury found all three guilty, and assessed against Horan and Coopwood a fine of \$250 each, and against Bean a fine of \$5.

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F. W. Chandler, Fred. Carleton, and Bethel Coopwood,
for the appellants.

George McCormick, Attorney-General, for the State.

WINKLER, J. There are apparently two counts in the indictment. The first count charges that the appellants, “on the tenth day of the month of July, in the year of our Lord one thousand eight hundred and seventy-five, in said county of Bexar and State of Texas, did unlawfully, wilfully, and forcibly prevent and defeat the execution of legal process legally issued by the clerk of the District Court of Bexar County and directed to the sheriff of Bexar County, said legal process being a writ of sequestration directing and commanding the sheriff of Bexar County to take possession of a certain tract of land in said writ of sequestration mentioned, and described in said writ of sequestration in the civil cause styled *Pierre Odet v. James E. Chandler et al.*, and numbered 5,127 on the civil docket of the District Court of Bexar County, and which land was then in the legal possession and control of H. D. Bonnett, sheriff of Bexar County, and of his legal deputies, agents, and employees, and which writ of sequestration had been issued by and under lawful authority, and was a valid and lawful legal process, and which was then in the hands of the said H. D. Bonnett, sheriff as aforesaid, and was then and there being executed by the said H. D. Bonnett, sheriff as aforesaid, his legal deputies, agents, and employees as aforesaid, in the manner as the said H. D. Bonnett, sheriff as aforesaid, had been directed by the said writ of sequestration, and under and by virtue of which writ of sequestration, issued out of the District Court of Bexar County as aforesaid, by the clerk of said District Court of Bexar County as aforesaid, and directed to the said sheriff of Bexar County as aforesaid, he, the said H. D. Bonnett, sheriff of the said county of Bexar, had taken possession of said land, and then was,

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by and through his legal deputies, agents, and employees, in the actual, peaceable, and lawful possession of said land mentioned and described in said writ of sequestration, under and by virtue of said writ of sequestration so lawfully issued to the said sheriff as aforesaid, and the said H. D. Bonnett, sheriff as aforesaid, his legal deputies, agents, and employees, having the lawful possession of said land, the said [defendants, naming them], with force and arms in their hands, then and there had and held at and towards the said H. D. Bonnett, sheriff as aforesaid, his legal deputies, agents, and employees as aforesaid, did prevent and defeat the execution of the said legal process, so lawfully issued and being executed by the said H. D. Bonnett, sheriff as aforesaid, his legal deputies, agents, and employees as aforesaid."

The second count charges that the said defendants (naming them), "on the day first aforesaid, in the year aforesaid, in the county aforesaid, did unlawfully, wilfully, and forcibly resist and oppose an officer in executing and attempting to execute a process in a civil cause, to wit: H. D. Bonnett, sheriff of Bexar County, his legal deputies, agents, and employees, in executing and attempting to execute a lawful process in a civil cause, legally issued by the clerk of the District Court of Bexar County and directed to the sheriff of Bexar County;" and going on to describe the writ substantially, and the civil suit in which it had been issued, as in the first count. It then proceeds as follows: "And which land was then in the legal possession and control of H. D. Bonnett, sheriff as aforesaid, and of his legal deputies, agents, and employees, and which writ of sequestration had been issued by and under lawful authority, and was a valid and lawful legal process, and which was then in the hands of the said H. D. Bonnett, sheriff as aforesaid, his legal deputies, agents, and employees as aforesaid, in the manner as the said H. D. Bonnett as aforesaid had been directed by said writ of sequestration, and under and by virtue of

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which writ of sequestration, issued out of the District Court of Bexar County by the clerk of said District Court as aforesaid, and directed to the said H. D. Bonnett, sheriff of Bexar County as aforesaid, he, the said H. D. Bonnett, sheriff as aforesaid of said Bexar County, had taken possession of said land, and then was, by and through his legal deputies, agents, and employees, in the actual, peaceable, and lawful possession of said land mentioned and described in said writ of sequestration, under and by virtue of said writ of sequestration so lawfully issued to the said sheriff as aforesaid, and the said H. D. Bonnett, his deputies, agents, and employees as aforesaid, having the lawful possession of said land, the said [defendants, naming them], with force and arms in their hands, then and there had and held at and towards the said H. D. Bonnett, sheriff of Bexar County as aforesaid, his legal deputies, agents, and employees as aforesaid, did unlawfully, wilfully, and forcibly resist and oppose him, the said H. D. Bonnett as aforesaid, his legal deputies, agents, and employees," contrary, etc.

It is evident that the pleader, in preparing the indictment, intended in the two counts to charge two offences set out in two articles of the Penal Code, and which are as follows, to wit:—

"Art. 216. If any person shall prevent or defeat the execution of any process in a civil cause, by any means not amounting to actual resistance, but which are calculated to prevent the execution of such process, he shall be punished by fine not exceeding five hundred dollars; evading the execution of said process is not an offence under this article." "Art. 221. If any person shall wilfully resist or oppose an officer in executing, or attempting to execute, any process in a civil cause, he shall be fined not exceeding five hundred dollars; and if arms be used in such resistance, the punishment shall be doubled."

It is not unworthy of notice, in this connection, to note

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that there are various articles of the Penal Code which provide for the punishment of those who shall wilfully oppose or resist an officer in executing, or attempting to execute, a warrant for the arrest of another person, in cases of felony or in cases of misdemeanor, as arts. 219 and 220; yet it is believed that arts. 216 and 221 are the only articles known to our law which by their terms would support a criminal prosecution for interfering in order to oppose or prevent the execution of civil process, as such, emanating from an officer or court in a civil cause. So that the legality of the proceeding under consideration, and the sufficiency of the indictment, must be tested by the provisions of these two articles of the Penal Code.

Several exceptions were taken in the court below to the sufficiency of the indictment, which were by the court overruled, and the action reserved by bill of exceptions, and which have been followed up in the motion for a new trial, and made the principal ground in a motion in arrest of judgment. The ruling is also assigned as error; so that the sufficiency or otherwise of the indictment is the first question which claims our attention.

It is admitted in the outset that the question is by no means free from difficulty and embarrassment, and in our search for light among the adjudicated cases we cannot better express our situation than by making the following quotation from Mr. Bishop, who says, in vol. 2, sect. 893, of his work on Criminal Procedure: "The varying views of courts upon these points will best appear in the digest appended in note 1. The particular cases are only differing manifestations, or differing opinions upon the manifestations, of the general principle that the indictment must show so much of fact as to make the offence affirmatively appear to the judicial understanding." This virtually sends us back to the provisions of our own Code of Criminal Procedure for the essentials of an indictment, and to see if we can there find a rule by which to solve the problem here presented for solution.

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We quote from the Code: "Art. 419. An indictment is a written statement of a grand jury, accusing a person therein named of some act or omission which, by law, is declared to be an offence." The essential requisites of an indictment are particularly enumerated and set out in art. 420, the seventh of which is that "the offence must be set forth in plain and intelligible words." "Art. 421. Every thing should be stated in an indictment which it is necessary to prove, but that which it is not necessary to prove need not be stated."

Among the special exceptions taken to the indictment are the following: 1. That it does not appear from the face of the indictment that any offence against the law was committed by the defendant. 2. It (the indictment) does not set forth the offence in plain and intelligible words, but, to the contrary, it is vague, indefinite, and uncertain. 3. It attempts to charge two separate and distinct offences. 5. After alleging the possession of the officer under the alleged process, it does not aver that the defendants ousted him from, or in any manner interfered with, his possession of the lands, or in any manner hindered, prevented, or resisted him, the officer, in the execution of the alleged process as to or upon the land against which the process is alleged to have been issued. Several other special exceptions are set out, some going to the entire indictment and others to each one of the different counts; the seventeenth is that neither of the counts state the acts and circumstances constituting an offence, but, to the contrary, both of the counts state conclusions. It is not proposed to discuss these exceptions *seriatim*, but only to show their general nature and bearing, and their applicability to such rules as we find so supported by authority as to, in some degree at least, furnish a guide in determining whether the exceptions to the indictment are well taken or not.

It is worthy of observation in this connection that in the indictment under consideration, at the time at which it is charged in the first count that the defendants "did unlaw-

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fully, wilfully, and forcibly prevent and defeat the execution'' of the process mentioned, as well as at the time when it is averred in the second count that the defendants '' did unlawfully, wilfully, and forcibly resist and oppose an officer in executing, and attempting to execute, a process in a civil cause,'' it is also averred in each count in the indictment that the sheriff to whom it is averred the process had been directed, his deputies, agents, and employees, were lawfully and peaceably in possession of the property embraced in the very writ which it is averred the defendants hindered and opposed the officer in executing and attempting to execute. It should be noted further that the only attempt in either count to state the acts of opposition and resistance is to the effect that they resisted and opposed the sheriff, and the other classes of persons named, '' with arms in their hands, then and there had and held at and towards '' the sheriff and others. It has already been intimated that we have had some difficulty in finding analogous cases which furnish rules for the solution of the question before us. In the limited time we have had to pursue our investigations, we have not found entire harmony in the authorities examined on the subject of what it is necessary for an indictment to set out in an indictment for resisting an officer in the execution of process in a civil cause, and which is the precise question here to be determined. We do not propose to discuss and contrast the authorities examined, but only to make reference to and citations from such accessible authorities as appear to afford us the best guides in arriving at a conclusion.

With us it is recognized as a general rule that it is sufficiently certain to describe an offence in an indictment in the language of the act creating the offence; but that there are cases where greater particularity is required, either from the obvious intention of the Legislature or from the application of known principles of law. *White v. The State*, 3 Texas Ct. App. 605, and authorities cited.

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In White's case, which was on a statutory offence, it was further deduced from the authorities cited, as follows: "Certainty is as to the matter charged and the manner of charging it. The things necessary to the description of the crime must be stated. As to the matter charged, whatever circumstances are necessary to constitute the crime imputed must be set out. It is otherwise when the crime alleged is such independently of the circumstances; for then they may aggravate but cannot constitute the offence. In all cases those averments which are descriptive of the crime must be introduced upon the record by averment, in opposition to argument or inference." To this extent there is no room for controversy.

Warden, J., in *Faris v. The State*, 3 Ohio St. 159, in delivering the opinion, discusses somewhat at length the adjudications of that and some other States, though mainly on a different branch of the subject from that we are considering. Still he treats somewhat of the necessary averments in an indictment for resisting an officer in the execution of process, and reviews, among other cases, that of *The State v. Downer*, 8 Vt. 424, not now accessible to us, but from which Judge Warden makes a quotation not inapplicable, and which we reproduce: "The process should have been so far set forth that the court could see that it was legal, and that the officer had authority to serve it. All the authorities, too, concur in requiring that the bill should contain an allegation of the particular mode of resisting the officer. And no doubt the mode in which the process was attempted to be executed should be specifically set forth. And it should be alleged that the respondents knew of the character in which the officer claimed to act." In speaking of the counts in Faris's case, where there were several counts in the indictment, the court say these counts are certainly not bad for duplicity; their defects are of an opposite character; they probably do not contain enough to satisfy the law of criminal pleading. The

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process it was there charged had been resisted was a writ of *feri facias*, and which was set out in one count of the indictment. In the case there was a count for a simple assault and battery, and on a general verdict the conviction was sustained, apparently on the idea that the count for assault and battery was not defective; but the court said they did not feel obliged, in that case, to fix the absolutely necessary requisites of an indictment for resisting an officer.

In *The State v. Henderson and Powers*, 15 Mo. 486, the attorney-general argued that the indictment was sufficient, saying: "It keeps close to the words of the statute, and seems to me to be sufficient;" and he cited the form of indictment for assaulting a constable in the execution of his office. 3 Chitty's Cr. Law, 831; 2 id. 144, 145, note a, in which he says it is said that it is not necessary to state that the party to be arrested was guilty of any offence or owed any debt, or that any affidavit of the debt was made. But the court (Ryland, J.) said: "The indictment should have recited the writ of which the defendants are charged to have opposed the execution, in order that the court might see that it was such a writ as the constable had by law a right to execute."

In *The Commonwealth v. Israel*, 4 Leigh, in an indictment at common law, charging a defendant with rescuing property distrained by a sheriff for public dues, from a bailee to whose safe-keeping the sheriff had committed it, without charging that the defendant knew in what right the bailee held it, it was held that the indictment was defective for not averring that the defendant had such knowledge, and that the defect in the indictment was not cured by verdict or by the statute of jeofails in criminal cases. See also *Lamberton v. The State of Ohio*, 11 Ohio, 282, where the prosecution relied on *Bachelder's Case*, 2 Gall. 15, to sustain an indictment for resisting a sheriff. The court said: "But it is said the case of *The United States v. Bachelder*,

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2 Gall. 15, will sustain this indictment. If it would, I would overrule it, for it could not stand without violating the spirit of our Bill of Rights.”

Without pursuing this inquiry further, we are of opinion that, by a proper application of the above authorities to the peculiar features of the case before us, the indictment is defective and insufficient in that it does not charge by proper averment the particular *mode* by which the sheriff and his deputies were opposed or resisted, and because it does not aver that the defendants *knew* the capacity in which the officer acted, or pretended to act, in the execution of the writ of sequestration mentioned in the indictment.

Taking this view of the case, it is unnecessary that we notice the other questions presented by the record. For the reason that the indictment is insufficient to state the offence, the judgment is reversed and the case is dismissed.

Reversed and dismissed.

F. M. LAWRENCE v. THE STATE.

1. **ELECTION LAW.** — The “entire day” within which the “act regulating elections” makes it penal to sell, barter, or give away any liquor comprises the twenty-four hours of the day of the election, from midnight to midnight thereof, and not merely the portion of the day during which the polls are open.
2. **STATEMENT OF FACTS.** — The approval and signature of the presiding judge are indispensable to render a statement of facts valid for any purpose whatever.
3. **SAME — PRACTICE IN THIS COURT.** — When no statement of facts is brought up in the record, this court cannot consider the applicability of the charge of the court below to the facts of the case.
4. **CHARGE OF THE COURT.** — Verbal charges are expressly prohibited in all felonies, without exception, and in all misdemeanors except by consent of the parties. In a misdemeanor case, disregard of this provision is material error if exception thereto was duly reserved at the time.

APPEAL from the County Court of Rains. Tried below before the Hon. E. P. KEARBY, County Judge.

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The case is disclosed in the opinion.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Though inartistically drawn, the indictment in this case is believed to be sufficiently certain to charge defendant with a violation of the twenty-first section of the act of the 23d of August, 1876 (Gen. Laws 15th Leg., p. 310), prohibiting the sale, barter, or giving away of any vinous, spirituous, malt, or intoxicating liquor within the limits of the county within which an election for municipal, county, district, or State officers is being held, during the day thereof. This disposes of the first ground of the motion to quash. The second ground is not borne out by an inspection of the record.

The third ground presents a question which was settled by this court in the case of *Haines v. The State*, ante, p. 30, wherein it was held that the words "entire day," used in the statute, meant from midnight to midnight, and not that portion of the day during which the polls were open and the election was going on.

The fourth and fifth grounds are not sustained when we examine the indictment. No error was committed in overruling defendant's motion to quash.

A paper purporting to be a statement of the facts in evidence on the trial is copied into the transcript, but it is not signed or certified to by the judge. To be of any validity whatever, the statement of facts must be approved and signed by the judge. Pasc. Dig., arts. 3138, 1490; *Brooks v. The State*, 2 Texas Ct. App. 1; *Wakefield v. The State*, 3 Texas Ct. App. 39; *Gindrat v. The State*, 3 Texas Ct. App. 537; *Roberts v. The State*, 3 Texas Ct. App. 47; *Owens v. The State*, 5 Texas Ct. App. 153; *Carter v. The State*, 5 Texas Ct. App. 458. There being no statement of

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facts in the case, we cannot consider any question raised with regard to the charge in its application to the facts.

There is, indeed, a bill of exceptions with regard to the charge, which, from the manner in which it comes up, is worthy of and entitled to notice, and which presents a matter fatal to the validity of the conviction. After retiring to deliberate upon their findings, the jury returned into court and announced that they wished further instructions; whereupon the court, over and against objections of the defendant interposed at the time, proceeded to charge and did charge the jury verbally upon the matters upon which they desired further information; and to which a bill of exceptions was duly saved. Such a charge is not alone unauthorized, but is directly prohibited by the statute. "No verbal charge shall be given in any case whatever, except in cases of misdemeanor; and then only by consent of parties." Pasc. Dig., art. 3065; Rev. Stats., Code Cr. Proc., art. 682; *Vanwey v. The State*, 41 Texas, 639; *Hobbs and Harris v. The State*, decided at the present term, *ante*, p. 117. *Carr v. The State*, 41 Texas, 543, is not analogous.

For this error in the charge of the court the judgment is reversed, and cause remanded for a new trial.

Reversed and remanded.

EDMOND COOPER v. THE STATE.

1. PRACTICE. — Rule 56 for the District Courts allows exceptions to evidence to be embodied in the statement of facts, and this rule is applicable to criminal as well as civil cases. But when this practice is adopted, in lieu of a bill of exceptions, the statement of facts should expressly show and note the exceptions; no intendments will be indulged. *Higginbotham v. The State*, 3 Texas Ct. App. 447, *contra*, explained.
2. SAME. — INCOMPETENCY of a witness by reason of his previous conviction of felony cannot be proved by the witness himself, if objection be duly interposed. The record is the best evidence, and it must show the judgment of conviction.

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3. **SAME.** — PARDON of a witness, relied on to restore his competency, should be proved by the charter of pardon. Art. 8110, Paschal's Digest, did not change this rule. (The second head-note in *Schell v. The State*, 2 Texas Ct. App. 80, was, it seems, a misconstruction by the reporters of the ruling in that case.) Rev. Code Cr. Proc., art. 730.
4. **CONTINUANCE.** — DILIGENCE is not shown by mere allegations that process for the absent witness was opportunely obtained and promptly placed in the hands of the sheriff. The application must also show whether the process has been returned, and, if so, when and by whom. Presumptions will not be indulged to supply these necessary allegations.
5. **EVIDENCE.** — Such collateral facts as are incapable of generating any reasonable presumption or inference respecting the guilt or innocence of the accused are not competent evidence, — as, for instance, the fact that an adverse witness had himself been prosecuted for crime. Nor, in general, is evidence admissible of the character of the person on whom the offence was committed, unless his character be part of the *res gestæ*.
6. **EVIDENCE OF WITNESS OUT OF THE STATE.** — The fact that a material witness is a resident of the State who, a few days before the trial, went and still is beyond the limits of the State constitutes no predicate for the introduction of the testimony given by him at a previous judicial investigation of the case.
7. **CREDIBILITY OF WITNESSES.** — There is no rule which requires a jury to believe an unimpeached witness, or to reject the testimony of a witness against whom impeaching evidence has been adduced. Though a jury should not reject testimony arbitrarily, its credibility is for their determination, in view of all the evidence, the manner of the witness, etc.

APPEAL from the District Court of Panola. Tried below before the Hon. A. J. BOOTY.

The indictment charged the appellant with an assault with intent to murder Luther Crenshaw, on September 19, 1878. The jury found the appellant guilty, and assessed his punishment at two years in the penitentiary.

Crenshaw was the principal witness for the State, and the only witness to the commission of the offence. He lived about three miles from the village of De Berry in Panola County, and the defendant lived near the same road, and between witness and the village. On the day alleged in the indictment, the witness and the defendant were both in the village of De Berry. Witness, being afraid of being attacked by the defendant as he should pass the latter's house in

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returning to his home, remained in De Berry until after eleven o'clock at night, and then started home on foot. When he arrived within about two hundred and fifty yards of the defendant's house, some person rose up from behind a log by the side of the road, and some twenty feet from witness, and said, "Hello! who is that?" Witness answered, "It's Bill," giving a false name to mislead the party, and turned and faced him, when the person instantly fired upon witness. Witness ran, and was fired upon again by the same person. He was struck in the neck by one squirrel-shot, which penetrated the skin, and on his left shoulder by sixteen other small shot, which went through his coat. The night in question was a starlight night, and the man who shot witness was the defendant; witness recognized him by his voice.

N. L. Davis, for the State, testified that he also was in De Berry, and there saw the defendant and Crenshaw, on the day alleged in the indictment. Defendant was drinking; and as he was leaving town, witness heard him say, "The son of a bitch might have to pass my house, and I'll see him when he passes," — or words to that effect. On cross-examination, the witness gave the defendant a good reputation as a quiet and peaceable man.

Another State's witness saw the defendant as he started home about sunset on the day in question. Defendant was muttering to himself as though he was mad, and appeared to have been drinking; which attracted the attention of witness, because it was the first time he had ever seen the defendant in that condition.

The defence introduced the wife of the appellant, and she stated that he was drunk when he got home on the evening spoken of, and that he fell down before the fire and slept there all night. She was up all night with a sick child, and knew that he did not leave the room that night. The next morning he went to bed with his clothes on, was sick, and sent for a doctor. She also stated that his only gun was

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not at home during the day and night when Crenshaw was shot, because her son, who lived a quarter of a mile from them, had borrowed it the day previous and had not returned it. The morning after appellant came home drunk, his horse was found in the field with the saddle still on him. In these statements about the gun and the horse she was corroborated by her son.

The defence also proposed to read the evidence of Louisa Sulton, given at an examining trial of the appellant upon this same charge, — it being shown that a week or ten days before this trial she had gone to Louisiana to visit her relatives, and had not returned. This was excluded on objection by the State, and the defence excepted.

The opinion states such other matters as are pertinent to the rulings.

Hazlewood & Hull, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. On the trial in this case, as shown by the statement of facts, when the assaulted party, “Luther Crenshaw, was offered as a witness by the State, defendant’s counsel examined him upon his *voir dire*, and proved by said witness that he had been convicted of a felony in the District Court of Harrison County, Texas, and served a term of eighteen months in the penitentiary. The county attorney then asked the witness ‘if he had not been pardoned by the governor.’ Defendant objected to the witness’s testifying only as to his having been pardoned, insisting that the pardon itself should be produced. The objection was overruled, and the witness was allowed to testify.”

To have entitled defendant to use this recital in the statement of facts, in lieu of a bill of exceptions expressly reserved to the action of the court admitting the testimony

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objected to, the statement of facts should have shown further, and it should have been noted therein in terms, that defendant “*excepted*” to the ruling. “Exceptions to evidence admitted over objections made to it on the trial may be embraced in the statements of facts, in connection with the evidence objected to.” Rules for the District Court, 56; 2 Texas Ct. App. 666; 47 Texas, 627.

We see no reason why this rule is not applicable to criminal as well as civil cases, and it will be thus recognized in cases where it has been properly availed of. But unless the exception to the ruling is made to appear affirmatively, no intendment will be indulged in its favor, since the rule is an innovation upon the settled practice in this State, which is that the rulings of the court below in admitting or excluding evidence will not be revised on appeal unless proper bills of exception were duly taken and brought up in the record. *Johnson v. The State*, 27 Texas, 758; *Brown v. The State*, 2 Texas Ct. App. 115; *Owens v. The State*, 4 Texas Ct. App. 153; *Poe v. The State*, 32 Texas, 65. (The case of *Higginbotham v. The State*, 3 Texas Ct. App. 447, where it was held that an exception to the ruling of the court mentioned in the statement of facts was not equivalent to a bill of exceptions, was a case which was tried before the rule quoted above was adopted.)

There is no doubt but that the objection was a good one if it had been properly saved by exception. One of the classes of persons declared by statute to be incompetent to testify is “all persons who have been or may be convicted of felony in this or any other State of the United States, or any other state or kingdom, unless such person or persons may have been pardoned for such crime,” etc. Pasc. Dig., art. 3109; Rev. Stats., Code Cr. Proc., art. 730. Had the county attorney objected in the first instance to the mode of attempting to prove that the witness was incompetent by reason of his conviction of a felony, the court would doubtless have sustained the objection, because “the con-

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viction of a witness for an infamous crime cannot be proved by the witness on his *voir dire*, he not being bound to answer; nor would his answer be the best evidence of which the case was susceptible.” *The People v. Herrick*, 13 Johns. 82. Nor is parol testimony of the conviction admissible in any case, but the party objecting must have a copy of the record of conviction ready to produce in court. *Hilts v. Colvin*, 14 Johns. 182. And it is not only necessary to show the conviction, but also the judgment, in order to disqualify the witness. *The People v. Whipple*, 9 Cow. 707; *Castellano v. Peillon*, 2 Mart. La. (N. S.) 466; *Cushman v. Loker*, 2 Mass. 208; *Skinner v. Perot*, 1 Ashm. 57; Cow. & Hill’s Notes, 1 Ph. on Ev. (4th ed.) 23, note 14.

“It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the party’s guilt, for the purpose of rendering him incompetent to testify. * * * And the judgment itself, when offered against his admissibility, can be proved only by the record, or, in proper cases, by an authenticated copy, which the objector must offer and produce at the time when the witness is about to be sworn, or at farthest in the course of the trial.” 1 Greenl. on Ev., sect. 375; *Schell v. The State*, 2 Texas Ct. App. 30. Authority to grant pardons in Texas is conferred upon the governor by the eleventh sect. of art. 4 of our Constitution. When granted, “a pardon may (and should) be proved by production of the charter of pardon under the great seal of the State.” *Schell v. The State*, 2 Texas Ct. App. 30; *Roberts v. The State*, 2 Overt. 423; *The State v. Blaisdell*, 33 N. H. 388; 1 Greenl. on Ev., sect. 317. In case of loss of original, the proof may be made by certified copy under the great seal of the State. This rule is not changed by Paschal’s Digest, art. 3110. But, as stated above, coming in the shape presented in the statement of facts, the objection cannot be considered in the light of an exception.

No error was committed in overruling the application for continuance; because whilst it is shown that the subpoena

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for the witness was taken out in time and placed in the hands of the sheriff, it is not shown what became of it, nor whether it was served or not served, nor that it was returned even. "The application should show to whom and when the subpoenas were delivered, and when and by whom they were returned, if returned." *Cantu v. The State*, 1 Texas Ct. App. 402; *Murray v. The State*, 1 Texas Ct. App. 417; *Buie v. The State*, 1 Texas Ct. App. 452; *Grant v. The State*, 2 Texas Ct. App. 163; *Johnson v. The State*, 4 Texas Ct. App. 268; *Henderson v. The State*, 5 Texas Ct. App. 134; *Fields v. The State*, 5 Texas Ct. App. 616.

In the case under consideration, the subpoena was issued and placed in the hands of the sheriff on the 20th; the trial took place on the 27th. The witness being a resident of the county, the subpoena, for aught that appears, may have been returned, after issuance, on the same or the next day, "not executed." If this had been the case, five or six days elapsing from such return to the day of trial, without taking steps to obtain other process, would clearly have shown want of proper diligence. What were the exact facts we are not apprised, because the return or failure to return the process is not shown; and the illustration is given to manifest the necessity that the return should be averred, or we are not in situation to say that diligence has been used; and presumptions cannot be indulged where it was within the power and became the duty of the party to avoid them by stating facts within his knowledge, or easily accessible.

A bill of exceptions was also reserved to the refusal of the court to permit the defendant to prove by the prosecuting witness, Crenshaw, that he (Crenshaw) had a great many enemies in the neighborhood where the assault upon the witness was committed; that the witness had been arrested for carrying a pistol into a church, and for unlawfully cutting timber on the land of another, and for carrying a gun into a court of a justice of the peace, and for seriously threatening to

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take the life of a human being, and for assault with intent to murder, — the purpose being to show that the assault on witness might have been by some other party than defendant.

This evidence was held by the court to be irrelevant, immaterial, and inadmissible. The ruling was correct; such evidence of collateral facts was incapable of affording any reasonable presumption or inference as to the principal issue or matter in dispute, to wit, the guilt or innocence of defendant. 1 Greenl. on Ev., sects. 51, 52. Such character of evidence has been discussed and considered time and again by this court, and held inadmissible. See *Bowen v. The State*, 3 Texas Ct. App. 617; *Boothe v. The State*, 4 Texas Ct. App. 202; *Walker v. The State*, 6 Texas Ct. App. 576; *Sharp v. The State*, 6 Texas Ct. App. 650. For additional authority upon the point, not cited in the above cases, see 56 Ga. 363; 57 Ga. 102; 30 La. An. 921. Nor, in general, is evidence admissible in regard to the character of the party on whom the offence was committed,— his character, save in exceptional cases, being no part of the *res gestæ*. 3 Greenl. on Ev., sect. 27; *Stevens v. The State*, 1 Texas Ct. App. 591.

Another bill of exceptions was saved to the refusal of the court to admit in evidence the written testimony, taken on the examining trial, of a witness who was temporarily absent from the State. There was no error in this; for the circumstances with regard to the evidence do not bring it within the exceptions rendering such evidence admissible, as they are declared in *Sullivan v. The State*, 6 Texas Ct. App. 319.

Though it has not been objected to, nor any additional instructions asked, we have examined with care the charge of the court, and find it in the main a very clear and able exposition of the law growing out of the facts. And though we cannot commend entirely that portion of it which instructs the jury in regard to their duty in weighing and

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determining the evidence, we are unable to say that it is in conflict with established authority. *Rideus v. The State*, 41 Texas, 199; *Leverett v. The State*, 3 Texas Ct. App. 213; *Walker v. The State*, 6 Texas Ct. App. 576; *Butler v. The State*, 3 Texas Ct. App. 48. The correct doctrine is, that "there is no positive rule that the jury must believe a witness who has not been impeached; nor must they reject his testimony if evidence has been offered to impeach him. The question of credibility, under all the testimony and indications from the manner of the witnesses, is for the jury, though they are not to reject a witness arbitrarily." *City Bank of Macon v. Kent*, 57 Ga. 253; *Evans v. George*, 80 Ill. 51; *Smith v. Grimes*, 43 Iowa, 357; *Green v. Cochran*, 43 Iowa, 545; *The State v. Smallwood*, 75 N. C. 104; *Chester v. The State*, 1 Texas Ct. App. 702.

The judgment is affirmed.

Affirmed.

JACK KASKIE v. THE STATE.

PRACTICE IN THE COURT OF APPEALS.—In the absence of a statement of facts, this court will revise the record no further than to ascertain whether the conviction has been had upon a good indictment, and one which sustains the charge of the court and the verdict of the jury.

APPEAL from the District Court of Henderson. Tried below before the Hon. J. C. ROBERTSON.

Under an indictment returned in March, 1875, for the murder of one Tittle, whose given name was unknown to the grand jury, the appellant was tried at the October term, 1879, and was convicted of murder in the second degree, with his punishment assessed at fifteen years in the penitentiary.

No statement of facts or bill of exceptions appears in the record.

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No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. Repeated decisions of this court, as well as of our Supreme Court under former constitutions, have established the rule that in the absence of a statement of facts, on appeal, the errors complained of will not be examined further than to ascertain whether the indictment is sufficient to sustain the charge and the finding of the jury. *Davis v. The State*, 6 Texas Ct. App. 196; *Carter v. The State*, 5 Texas Ct. App. 458; *Longley v. The State*, 3 Texas Ct. App. 612; *Keef v. The State*, 44 Texas, 582; *Koontz v. The State*, 41 Texas, 570; *Barrett v. The State*, 25 Texas, 605.

The indictment is drawn in accordance with approved precedents, and sufficiently charges appellant with the offence of murder with express malice. No defects have presented themselves to us in our examination, nor have any been pointed out to us; and it fully supports a charge of murder in the second degree, the offence of which appellant was found guilty.

The charge of the court presents elaborately and fully the law applicable to cases of murder in the first and second degrees, and no part thereof occurs to us as manifestly erroneous under any state of the evidence.

As the case is presented, we find no error in the judgment, and it is therefore affirmed.

Affirmed.

A. FRIEDLANDER AND W. MORRISON v. THE STATE.

1. DISTURBING PUBLIC WORSHIP. — Note evidence held sufficient to sustain a conviction for this offence.
2. MOTION IN ARREST OF JUDGMENT can impugn the sufficiency of an indictment or information upon no other grounds than those which would be good upon exception thereto for a substantial defect therein, and which are set forth in the Code of Criminal Procedure. The validity or the want of an order of the District Court transferring a misdemeanor case to an inferior court for trial cannot be questioned by motion in arrest of judgment.

APPEAL from the County Court of Rusk. Tried below before the Hon. A. J. SMITH, County Judge.

A clear statement of the case is given in the opinion.

Jones & Wynne, for the appellants.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. Appellants were jointly indicted and convicted for wilfully disturbing a congregation assembled for religious worship, and, appealing to this court, complain that the evidence was not sufficient to support the conviction, and that the court in which the conviction was had, the County Court of Rusk County, had no jurisdiction of the case, by reason of a failure of the District Court of said county to make the proper order of transfer after presentment of the indictment.

The evidence disclosed by the statement of facts shows that on Sunday, the tenth day of December, 1878, a congregation consisting of about one hundred and fifty persons, and including appellants, had assembled for religious worship in the town of Overton in Rusk County, and said congregation were conducting themselves in a lawful manner. It further shows that during the service appellants were guilty of repeated acts of misbehavior; and that in the closing prayer, after the conclusion of the sermon,

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one of them groaned aloud, which caused the minister to be disturbed, according to his testimony. It further appears that during the service, and, presumably from the evidence, during prayer, appellants were laughing and talking together to such an extent as to distract the attention of persons in the congregation, and cause them to turn their thoughts from worship to ascertain the cause of the disturbance.

From these facts, the court below, to whom the case was submitted without a jury, was authorized to find that appellants had wilfully disturbed the congregation; and we are not prepared to say that this finding was against the evidence, or without evidence to support it. *McElroy v. The State*, 25 Texas, 507; *Hunt v. The State*, 3 Texas Ct. App. 116.

A motion in arrest of judgment cannot be used, in our practice, to question the validity of a transfer of an indictment from the District Court to some inferior court having jurisdiction of the offence charged. Such motion can be based upon no other ground than such as would be good upon exception to an indictment or information for any substantial defect therein. Rev. Code Cr. Proc., art. 787. These grounds of exception are set forth plainly in the statute, and do not include the ground set up in the motion in this case, to wit, the invalidity of the order, or total want of an order, transferring the case from the District Court to the County Court. Rev. Code Cr. Proc., art. 528. The objection came too late after verdict, and is not sustained by the record before us, which shows an order for transfer substantially sufficient under the law.

There is no material error in the record, and the judgment is affirmed.

Affirmed.

W. W. KNIGHT v. THE STATE.

1. **APPEAL.** — The effect of an appeal to this court is to suspend and arrest all further proceedings in the case by the court *a quo*, until it receives the judgment of this court. It is not competent, therefore, for the court below, pending an appeal, to so amend its minutes as to make them show that the defendant pleaded not guilty.
2. **SAME.** — A defendant is not required to await the conclusion of the term of the District Court at which he has been convicted, before prosecuting an appeal from its judgment. He may prosecute his appeal immediately upon the rendition of the judgment.
8. **BILL OF EXCEPTIONS.** — A document purporting to be a bill of exceptions signed by by-standers will not be recognized by this court as part of the record, unless it has the statutory requisites of a bill so signed. The recital that, "the judge having refused to sign this, it is signed by the undersigned by-standers," with three names subscribed thereto, does not authenticate a bill of exceptions.

APPEAL from the District Court of Dallas. Tried below before E. G. BOWER, Esq., Special Judge.

R. H. West and N. P. Jackson, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was indicted, jointly with one T. J. Barnhart, for the theft of a cow belonging to one Millie Fondron. The appellant, being tried alone, was convicted; a motion for a new trial was made and overruled, and notice of appeal was given in open court. Judgment was entered on the verdict, and the defendant was sentenced in accordance with the verdict and judgment; and this appeal was prosecuted.

From the view taken of the merits of this appeal, it will not be necessary to notice the several errors assigned, except in so far as they are necessary to a decision, and likely to arise on another trial. There are two transcripts of the record before us. The first transcript was filed in this court on April 5, 1879. On April 19, 1879, the attorney-general representing the State, filed a motion for *certiorari*, which

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was granted, and on June 12, 1879, a writ of *certiorari* was issued, requiring the clerk of the District Court to send up a correct transcript of the record of the case; and in obedience to the *certiorari*, a second transcript was prepared and sent up, which was filed in this court on September 27, 1879. The *certiorari*, agreeably to the return of the sheriff, was executed June 16, 1879. The precept which accompanied the notice of the motion for *certiorari* appears to have been served on appellant April 28, 1879. On April 22, 1879 (agreeably to the note of the clerk in the margin), an order was made in the District Court in the case, as follows: "It is ordered by the court that the clerk of this court do correct the minutes of the court in this cause so as to show that the defendant, W. W. Knight, when on trial, pleaded not guilty as charged."

It is evident from the dates that this order was made after the case had been removed to this court by appeal. This order the court had no authority to make, even if the clerk had made the order in fact and had so amended the record (but which does not appear to have been done), for the reason that by the appeal and the filing of the record in this court, the jurisdiction of the District Court was at an end and the jurisdiction of this court had attached, agreeably to art. 727, Code of Criminal Procedure (Pasc. Dig., art. 3191), which declares that "the effect of an appeal is to suspend and arrest all further proceedings until the judgment of the Supreme Court [Court of Appeals] has been received by the District Court." *Hill v. The State*, 4 Texas Ct. App. 559; Rev. Code Cr. Proc., art. 849.

It may be supposed that the minutes of the court were under the control of the court, and subject to correction at any time before the adjournment for the term, which is ordinarily the case; but this power ceases whenever an appeal in a case of felony has been taken in the manner required by law, and the transcript has been filed here. The defendant had done all the law required of him to notify the court

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and the prosecuting attorney that he intended to prosecute an appeal in this court; he had, in the terms of the statute (Code Cr. Proc., art. 726; Pasc. Dig., art. 3170; Rev. Code Cr. Proc., art. 848), given notice of appeal in open court and had the same entered of record, as shown by the first transcript. The defendant was not required to await the adjournment of the court before prosecuting his appeal, but was authorized by law to prosecute it immediately if he so desired. Code Cr. Proc., art. 721; Pasc. Dig., art. 3185; Rev. Code Cr. Proc., art. 843. It being a felony case, and the transcript not showing that he pleaded to the indictment, or that a plea was entered for him, he was entitled to have the judgment reversed. *Bush v. The State*, 5 Texas Ct. App. 64, and authorities therein cited.

It is attempted to be made to appear by bill of exceptions that the court had provided a jury of twenty-four men for the week, and that the court had of its own motion excused two of this number without having their places filled, and, when the accused was brought into court, had twenty-two jurors drawn from the jury-box, and required the defendant to strike from the list of twenty-two, without first having filled the panel to twenty-four, and thus his challenges were exhausted, leaving but nine in the box; that three jurors were summoned as talesmen, whom he attempted to challenge, but was not permitted so to do. This bill of exceptions, it is stated, the judge refused to sign, and it appears to have been signed and certified by three by-standers, and filed by the clerk. This document, purporting to be a bill of exceptions, is not prepared as required by the law which authorizes by-standers to certify to the matters set out therein, and therefore cannot be considered. Pasc. Dig., arts. 217, 218; *Houston v. Jones*, 4 Texas, 170; Rev. Stats., arts. 1353 *et seq.*

On the trial, the prosecution was permitted to prove, over objection, certain facts in the nature of admissions derived from T. J. Barnhart, the jointly indicted co-defendant of

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the appellant; the apparent objection being that the admissions were made after the accomplishment of the conspiracy, and the defendant Knight not being present when they were made. It does not clearly appear that this testimony was admissible. The following extract from the opinion of the court in *The People v. Davis*, 56 N. Y. 95, and the authorities there cited, lays down substantially the correct rules by which to determine the question: "The general rule is, that when sufficient proof of a conspiracy has been given to establish the fact *prima facie*, in the opinion of the judge, the acts and declarations of each conspirator in furtherance of the common object are competent evidence against all (Citing 1 Wheat. 702; 3 Greenl. on Ev., sect. 94; 1 Taylor on Ev. 527.) But to make the declaration competent, it must have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gestæ* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against others." (Citing 1 Taylor on Ev. 542, sect. 530.)

In view of another trial, we are of the opinion that the charge is in one respect objectionable. After the judge had properly instructed the jury that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses, the charge proceeds as follows: "You may believe or disbelieve all or any portion of the statements of any witness; you may believe one witness and disbelieve another; you may believe a portion of the statements of a witness and disbelieve other portions of said statement." *Bishop v. The State*, 43 Texas, 390; *Stuckey v. The State*, decided at the present term, *ante*, p. 174.

For the reasons above stated, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

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RANSE JOHNSON v. THE STATE.

1. PRACTICE. — Objection that the minutes of court fail to show that the indictment was presented by a grand jury of the proper county, and by them duly returned into the District Court thereof, cannot be entertained when it is primarily made by motion in arrest of judgment.
2. PRACTICE IN THIS COURT. — When requested instructions appear in the record, without any thing to indicate whether they were given or refused, the presumption on appeal is that they were given.
3. FACT CASE. — See evidence which, on the authority of *Cato v. The State*, 4 Texas Ct. App. 87, is held sufficient to support on appeal a conviction for aggravated assault with a knife, though the accused neither struck with it nor was prevented from striking.

APPEAL from the District Court of Rusk. Tried below before the Hon. A. J. BOOTY.

The parties in the affair appear to have been colored people. Charley Writings, the assaulted party, testifying for the State, deposed that it occurred close to a spring near a church in Rusk County. Witness and one Bennett got into a difficulty, and witness jumped on a bank above the spring and boasted that he was the best man on the ground. The defendant, standing close by, thereupon drew out a large dirk-knife, about six inches long, and raised it in a striking attitude, and near enough to reach witness with it, telling witness that if he moved he would “cut his d—d guts out.” Witness, being unarmed, did not move, for fear of being cut; and the defendant, after holding the knife in a striking attitude for a moment or so, pushed witness with his left hand, and then turned and went away. This was all the material evidence for the State.

John Burney, for the defence, testified that he was very near the parties on the occasion in question, and saw every thing that passed. When Charley Writings made his boast that he was the best man on the ground, the defendant, who was standing near him, said, “Charley, you ought not to talk so;” but he did not draw any knife upon Charley,

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nor lift one over him in a threatening manner. Defendant had a small pocket-knife in his hand, whittling on a small stick, but made no attempt whatever to use it on Charley. Witness was certain he could have seen any such attempt, and positive that none was made. Cross-examination elicited the facts that witness was a "half-brother-in-law of the accused, and a member of the church, who always tried to tell the truth;" whereas, *per contra*, Charley Writings bore a bad reputation in that regard. Two or three other witnesses concurred in this estimate of Charley's reputation; but it seems he had not lived in their neighborhood for several years.

Other matters are disclosed in the opinion.

Drury Field, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. In this case appellant was tried under an indictment for assault with intent to murder, and was found guilty of an aggravated assault, with his punishment assessed by verdict and judgment at a fine of \$27. This trial was had since the adoption and in pursuance of the provisions of our Revised Statutes. Under art. 498 of the Penal Code, the punishment for aggravated assault or battery now is "by fine not less than twenty-five nor more than one thousand dollars, or imprisonment in the county jail not less than one month nor more than two years, or by both such fine and imprisonment."

Primarily no objection was made to the indictment, but through his motion in arrest of judgment for the first time defendant seeks to call in question the validity of the indictment, because the minutes of the court do not show that it was presented by a grand jury of Rusk County and returned into the District Court as required by law. Rev. Stats., arts. 414, 415. Such objection cannot be entertained on a motion in arrest of judgment. *Houillion v. The*

Syllabus.

State, 3 Texas Ct. App. 538; *Jinks v. The State*, 5 Texas Ct. App. 68.

Several special instructions were asked in behalf of defendant, which, according to a note of indorsement made by the clerk, were refused; but they are not indorsed "given" or "refused," nor are they signed by the judge. If refused, the action is not made the subject of either a bill of exception or of an assignment of error. Where the record is entirely silent, the presumption is the instructions were given as asked. *Seal v. The State*, 28 Texas, 491. Whether we should treat them as given or refused is immaterial in this case, since it appears to us that the charge of the court was sufficiently full and explicit, and it is not obnoxious to the criticism or objection of counsel as embodied in the supposed bill of exceptions copied into the record. This bill of exceptions is not approved, signed, or certified by the judge, and we are not apprised by what authority it has been incorporated into the record as a part of the proceedings.

In its salient features, the evidence presented a case in legal contemplation quite similar to *Cato v. The State*, 4 Texas Ct. App. 87, and, upon that case and the authorities there cited, no good reason is seen why the judgment of the court below in this case should not be affirmed, and it is therefore so ordered.

Affirmed.

ANDREW HUNT v. THE STATE.

1. MURDER IN THE FIRST DEGREE. — The Constitution of 1869 provided, in effect, that the punishment for murder in the first degree, which by statute was previously death alone, should be death or imprisonment at hard labor for life. The Constitution of 1876, which superseded that of 1869, retained in force "all laws and parts of laws" not repugnant, but contains no other provision affecting the punishment for murder in the first degree; and until the adoption of the Revised Penal Code, which took effect July 24, 1879, there was no statutory legislation on the subject subsequent to the abrogation of the Constitution of 1869 by that of 1876. *Held: First*, that

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the Constitution of 1876, in superseding that of 1869, abrogated the said provision of the latter, but retained in force the antecedent statutory punishment for murder in the first degree, viz., death alone. *Second*, in a trial for murder in the first degree, committed while the Constitution of 1869 was in force, it is still necessary, as heretofore held, that the aforesaid provision of that Constitution be given in charge to the jury, inasmuch as it is part of the "law applicable to the case;" but in a trial for murder in the first degree, committed since the Constitution of 1876 became operative, and before the Revised Penal Code took effect, it was not error to instruct the jury that the penalty was death.

2. **CONSTITUTIONAL CONSTRUCTION.**—Technical rules are not to control the interpretation of a written constitution. It is to be so expounded as to give effect to its principles and accomplish the ends of government, and not so as to defeat them. See the opinion *in extenso* on this subject.
3. **CHARGE OF THE COURT.**—In trials for murder, wherein the inculpatory evidence is purely circumstantial, it is necessary that the court give in charge to the jury, as "law applicable to the case," the legal principle that the facts proved must be inexplicable except by the hypothesis of guilt, must be consistent with each other and with the main fact in issue, and must each be established by evidence as cogent as if it were the main fact. An instruction to this effect is not a charge on the "weight of evidence;" and though it is but a development of the doctrine of reasonable doubt, yet when the inculpatory evidence is entirely circumstantial its omission is not supplied by the ordinary charge of that doctrine requisite in every trial for a felony.
4. **SAME.**—In giving instructions to a jury, it is never safe to depart from established authorities; and in trials for murder, the courts of this State cannot err if, without attempting novel expositions of the law, they adhere to the language of standard cases.

APPEAL from the District Court of Williamson. Tried below before the Hon. E. B. TURNER.

At the March term, 1878, of the court below, the appellant was indicted for the murder of Harvey Carter, on September 28, 1877. One count of the indictment alleged a knife to have been the means used, and a second count alleged a pistol. A mistrial of the case was had at the same term of the court. At the September term, 1878, the appellant was again put on trial, and was found guilty of murder in the first degree, and adjudged to die. The grounds upon which he appeals to this court are disclosed in its opinion.

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The homicide was an assassination, and the evidence quite singular in its disclosures. Of many witnesses examined, there was none who saw the deed committed, and the voluminous evidence is entirely circumstantial in so far as it tends to inculcate the appellant. There is no occasion to give it in detail, and only an outline of the material disclosures will be attempted.

The appellant, it appears, was a man of family, and lived on his farm, which was about twenty miles from the town of Round Rock, in Williamson County. Carter, the deceased, was a single man, and farmed with the appellant on the latter's place during the cropping season of 1877. In the forenoon of the day on which Carter was murdered (September 28, 1877), he and the defendant took their wagon and two-horse team to the gin of Hayden Hunt, in their neighborhood, and there took on two bales of cotton, one of which belonged to them and the other to Hayden Hunt, who sent his bale by them to market at Round Rock. The road from the gin towards Round Rock was sparsely settled, and no witness saw them on their route on the day of the murder, until after they had gone into camp at Pucket's Spring, a camping-place about three miles from Round Rock.

About sunset on the same day, J. W. Perry, Ben. Perry, and W. R. Copeland camped at Pucket's Spring, on their homeward way from Round Rock, where they had just sold six bales of cotton. Soon after they stopped to camp, Andrew Hunt (the defendant, commonly called Drew Hunt) and Harvey Carter, the deceased, came on foot from the spring to the camp of the Perrys and Copeland, and inquired of these latter if they had been to Round Rock, and what was the price of cotton. In a few minutes they left, saying they were going to their camp, which was in a south-westerly direction, and considerably over a hundred yards distant. Soon after nightfall, and while the Perrys and Copeland were cooking their supper, the appellant and

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deceased again came to their camp. They seemed on friendly and good terms with each other, though one of the witnesses said that the defendant was stepping about the camp, and seemed restless and uneasy. Before their second appearance, three other men had come into the Perrys' camp. They were named Collier, Goats, and Jennings, were riding, and two of them had Winchester rifles. They seemed somewhat intoxicated, and asked for water to mix with some alcohol, and at their invitation all present except the deceased took a drink of the alcohol and water. Soon afterwards these three men left, riding rapidly along the road, which led in a westerly direction. Their horses' feet were heard for a considerable but indefinite distance. Whether they or the defendant and the deceased first left the camp of the Perrys seems somewhat uncertain from the testimony. However that may be, but a short space of time elapsed after the departure of their visitors before the Perrys and Copeland heard three shots in the direction of the camp of the defendant and the deceased, and immediately the voice of the deceased was heard by the Perrys, exclaiming, "O Drew! O Drew! O Drew!" followed by a strangling or gurgling noise. According to Copeland, the words were, "O Drew! O Drew!" followed without interval by the word "shoot." Though listening for more, these parties heard nothing further, —neither walking, talking, running, horses' steps, or other noise, —until in a very brief space of time, perhaps as much as two minutes after the gurgling noise, the defendant suddenly appeared in their camp, panting and apparently scared, in his shirt-sleeves and pants, but without coat, hat, or shoes, and exclaimed, "Good God! what shall I do? Harvey is dead (or killed) and I am cut all to pieces. Robbers or murderers have run in on us and killed Carter, and cut me all to pieces." Instantly the Perrys, apprehensive for themselves, extinguished their camp-fire. Defendant asked them to go back with him to Carter. They refused to do so, and he then said he wanted to

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go to the spring for water, and J. W. Perry advised him not to do so, but to go to town and get an officer; and in a few minutes the defendant and Ben. Perry started to Round Rock for an officer, riding horses belonging to the Perrys. Copeland and J. W. Perry took refuge in Pucket's sugar-cane patch until Ben. Perry and the defendant returned with an officer and a number of men; and while in the patch they heard, in the direction of the camping-ground, a noise like a low voice uttering "ugh," as described by Copeland.

Ben. Perry, who accompanied the defendant to Round Rock, stated that when they reached Brushy Creek the defendant washed his face and hands, and when they arrived at Hall's, who was a deputy-sheriff, defendant was taken in where there was a light, and found bloody on the hands and arms; but he showed no cuts. The deputy-sheriff and his posse, accompanied by Ben. Perry and the defendant, proceeded promptly to the camp of the defendant and the deceased. When they reached the ground the defendant went into the brush and said, "Here, boys, is Carter; he is dead." The deceased had on no shoes or pants; he was found in his shirt, drawers, and socks, dead, at a distance of forty yards from his and the defendant's wagon, and eighty yards from and in the direction of the camp of the Perrys and Copeland. According to Ben. Perry's testimony, the defendant, when he came panting to their camp, immediately after the shooting, made not only the statement already related, but added that two men came up right behind the pallet of himself and Carter, and fired in on them, killed Carter and cut him; that, "just as he was lying down, Carter being already down, he heard a brush or stick crack; he raised up, and about that time they fired in on them; saw two men; one had a pistol, the other a short gun; they were about five steps distant when they fired on them; they were coming up half-bent. He said one of them (Carter or Hunt) ran under the wagon, and

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the other around the wagon. I think he said that he, defendant, ran under the wagon, and Carter around the wagon; said Carter called to him and said, 'O Drew! O Drew! don't leave me,' and he ran back to him and caught hold of him sort of under his arms, to help him off, and ran with him about ten steps, and they crowded him so close he left him.'" Defendant also stated that he had no arms, but that Carter had a pistol with three loads in it; but that he (defendant) did not know whether it was in the feed-box, or where it was, — that Carter had been shooting at squirrels with it that evening. No arms were seen on the defendant; and he went willingly with Ben. Perry after the officer, and returned willingly to the scene of the murder. Carter's body was taken to Round Rock that night, and Dr. Cochran, by request of the acting coroner, examined it the next day, and found that one gunshot entered at the navel and passed round until it lodged just under the skin, near the right hip-joint. Another entered near the backbone, opposite the left shoulder, passed along the shoulder-blade, and lodged at the left shoulder-joint, which it shattered. A third passed through the leg. There were two knife-wounds in the throat, — one a cut across the neck, and the other a thrust through the neck. The gunshot wounds were not mortal; death resulted from the cuts in the throat. Two of the bullets were found, and were pronounced to be six-shooter balls. Though no witness heard more than the three shots, and they are already accounted for, a fourth bullet-hole was found in the shirt of the deceased. It passed through the sleeve of the shirt, near the wristband, and some of the witnesses thought it must have been made by a larger ball than those which took effect as already stated.

The defendant and Ben. Perry were summoned by the officer as part of a posse to go in quest of Collier, Goats, and Jennings the same night, and after the murder. Guns were furnished them, and they went; but, after reaching

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Jennings's, the officer told them they might go home, and Perry accompanied the defendant to the house of Wash. Williams, the father-in-law of the defendant, whose wife was there. The next day the defendant returned to Round Rock, by himself, and still armed with the gun furnished him the previous night. No injuries were apparent upon his person, except some scratches on his face and a slight one upon his arm. The theory of the prosecution was that the deceased inflicted these scratches when the defendant was cutting his throat; that of the defence was that the defendant received them as he fled through the brush to the camp of the Perrys. Each theory found an advocate in the two doctors who were examined on the trial. One thought them "evidently made by human hands," because they were deepest where they began, and became shallower and more irregular as the nails filled with the skin, whereas scratches made by bushes would become deeper as they progressed. The other physician was of opinion they were too narrow to have been made by finger-nails. A good deal of blood was on the shirt and pants of the defendant. This, according to the prosecution, spurted upon him as he cut his victim's throat; according to the defence, he received it in trying to succor his friend.

The prosecution having elicited from a witness part of the testimony given by the defendant as a witness at the coroner's inquest, the defence introduced the whole of it as taken down on that occasion. After narrating the visit of himself and the deceased to the camp of the Perrys, and the stoppage there of Collier, Goats, and Jennings, his testimony proceeded: "In a few minutes after we went back to our camp, we went to bed. I heard some parties riding off, which I supposed to be those three men. I think they went off in a north-west direction. In some five minutes after we went to bed I heard a noise, and raised up, and just as I raised up I saw two men. Just then they fired; they were about five steps from us; one had a gun,

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the other a pistol. When they fired I jumped under the wagon. When I looked around I saw the deceased coming towards me, hallooing, 'O Drew! O Drew! don't let them shoot.' I then ran and met him, and carried him some twenty-five yards, they still following and shooting. I ran into a bunch of bushes with deceased, and when I got there they had overtaken us, and was cutting at us with knives. I then let deceased loose, and ran. I ran up to Mr. Perry's camp. I was excited, and it was dark. I could not recognize the parties that did the shooting and cutting. I think deceased had raised up before he was shot. They were on the west side of the camp. I do not remember how many shots were fired. I recognize the corpse to be that of Harvey Carter. The men that came to the camp looked to be about the same size, — that did the shooting. The deceased had a pistol, but I know there was not more than one barrel loaded. I do not know that deceased had the pistol in his hand at the time the shooting took place. We lay with our heads towards the north. Mr. Kilpatrick found the pistol referred to, this morning, east of where we were lying; the corpse also was east, and the pistol was four or five steps north of where the corpse lay. The pistol was found on the trail on which the deceased was carried up the hill, very near on a line from our camp to Perry's camp."

Carter's pistol, as appears by other testimony, was found by Kilpatrick at a distance of seven or eight feet from the corpse, and in the direction of Perry's camp.

To show express malice, the prosecution introduced Mrs. Adams, who testified that about two months prior to the murder, at the washing-place of the defendant's father-in-law, she heard a conversation between the defendant and his sister-in-law, Miss Dona Williams. Defendant said he would be d—d if Dona Williams and Harvey Carter should marry; that he (defendant) would die and go to hell before she should marry him. "Dona said defendant should not object; and Dona and defendant quarrelled about Carter,

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and defendant said he would kill Carter before he (Carter) and Dona should marry, even if he should have to die and go to hell for it." The defendant's wife was present at the time. The defence introduced the defendant's wife and Mrs. McClure (formerly Miss Dona Williams), and they both positively denied that any such conversation ever passed between the latter and the defendant. Mrs. McClure further states that she and the deceased were engaged, and that the defendant never opposed their marriage; and she and others testified that the defendant, only a week or two before the murder, named his little son after Carter, with whom he was entirely friendly.

As already stated, the jury found the defendant guilty of murder in the first degree, and judgment of death was rendered against him.

Makemson & Fisher, for the appellant. The first question presented in the motion for new trial is whether or not there is any penalty attached to murder in the first degree within this State; and if not, why.

If there is, what is that penalty? Is it death, or imprisonment in the penitentiary for life in lieu thereof?

We shall maintain that there is no penalty for murder in the first degree.

By the adoption of the Criminal Code, the punishment of murder in the first degree was declared to be death. Art. 612.

This remained as the only penalty until the 30th of March, 1870, at which time the Constitution of 1869 became operative, when it was so changed that the jury had the power to punish by death, or by imprisonment for life in the penitentiary.

In support of our position; and to show that we have not mistaken the penalty as it existed after the adoption of the Constitution of 1869, we will refer the court to the case of *Murray v. The State*, 1 Texas Ct. App. 427, where the

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following language is used, to wit: “We are cited to *Dawson v. The State*, where it was held ‘that all that can be claimed for this section of the Constitution is that it vests in the jury a power of commuting punishment, heretofore vested in the executive. 33 Texas, 492.’ We confess we cannot see the distinction sought to be made. Imprisonment for life, whether so declared in so many words or not, was nevertheless, under sect. 8, art. 5, a legitimate mode of punishment for murder in the first degree, whenever the jury in their discretion saw proper to impose it; and so long as it might be legitimately imposed, we cannot see why it was not as much a penalty for the crime as the infliction of death. And the same court which decided *Dawson v. The State* must have come to and entertained this opinion, for they subsequently held that the omission of the judge to charge the jury, in a case of murder, that the punishment for murder in the first degree might be commuted to imprisonment at hard labor for life was such error as demands of them a reversal of the case. *Marshall v. The State*, 34 Texas, 664.

“To our minds, the conclusion is axiomatic, and seems ‘to follow as the night the day,’ that so long as murder of the first degree might be punished by imprisonment for life, imprisonment for life was a penalty or mode of punishment for murder of the first degree, recognized by law.”

It is true that we must look to the Constitution in order to find that the penalty for murder in the first degree has been changed; but this is immaterial; the effect is the same as if the Legislature had enacted “that murder in the first degree shall be punished with death or by imprisonment in the penitentiary for life,” with this difference: if a legislative act, it would have been necessary for the Legislature, in legislating upon this penalty, to have referred to the act sought to be amended, and to have reenacted the section at length; while nothing of this kind is required of the

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convention which framed the Constitution. The convention had the power to change every penalty in the Criminal Code if they saw proper to do so; and it is immaterial by what name this change may be called: you may call it an amendment, a modification, a power to commute, or a repeal, — the effect nevertheless is felt, and is the same in either instance; the penalty is gone, and a new one substituted.

The only offence that we had, prior to the adoption of the Constitution of 1869, punished absolutely with death, without an alternative penalty, was murder in the first degree; and therefore when the Constitution of 1869 speaks of capital offences, — that is, offences punished only with death, — the framers of the Constitution could only have intended to affect the penalty of this particular offence.

As an evidence that they could only have intended to affect this particular offence, all that we have to do is to refer to some of the offences under our Code, to show that it would have been but an idle consumption of time to have intended to affect any thing else. For instance, treason, under the act of 1856, is punished with death or imprisonment for life, at the discretion of the jury. Rape, under the act of 1866, is punished by death, or imprisonment in the penitentiary not less than five years. Arson, in one instance, is punished as murder; it therefore follows the penalty for murder. If the Constitution had these offences in view, what object could the framers thereof have had in saying that these offences should be punished by death or by imprisonment, when the penalty already attached to each had given that discretion to the jury?

But, assume that they intended it to operate upon every offence where the penalty could be death, and that they intended to throw around every person charged with so grave a crime its mantle of mercy to protect the criminal against the harshness of future legislation; then, even, it is admitted that this provision of the Constitution enters into

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and becomes a part of every penalty to each offence upon which it operates.

Our theory, then, is that the Constitution of 1869 changed the penalty of murder in the first degree from death absolutely, to death as its maximum and imprisonment for life as its minimum. In other words, the penalty formerly existing was repealed by the creating of a new penalty. In this we believe that we are sustained by authority.

When a statute imposes a new penalty for an offence, it repeals by implication so much of the former as establishes a different penalty.

In the case of *The Commonwealth v. Kimball*, 21 Pick. 375, the question arose whether the act of 1838 was so far inconsistent with the Revised Statutes of Massachusetts (chap. 47, sect. 3) as to operate as a repeal of the former by implication. The Revised Statutes imposed a penalty of \$20 for persons violating the provisions of the statutes relating to excise, and the act of 1838 imposed a penalty of not more than \$20 nor less than \$10.

In the case of *Murray v. The State*, 1 Texas Ct. App. 429, referred to above, the court has already held that imprisonment for life was, prior to the Constitution of 1876, a part of the penalty for murder, as much so as if it had been a part of the act itself. Bearing this in mind, we will see what the Supreme Court of Massachusetts say as to the effect of this additional penalty.

The court said that "two statutes were passed, at different times, concerning the present case. The former prohibits the forbidden act under a penalty of twenty dollars for each offence; the latter prohibits the same act on pain of forfeiting not more than twenty dollars nor less than ten dollars for each offence. *The former is absolute and imperative; the latter allows a latitude of discretion.* It appears to the court that one is essentially and substantially inconsistent with the other; that the latter statute, by prohibiting

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the same act under a lower penalty, though no negative words were used, did in effect declare that it shall not be punished by the higher penalty, and therefore the acts are inconsistent; that the penalties as they stood in the two acts were equally inconsistent. The former enacted that the offence should be punished by a penalty of twenty dollars; the latter declared that the same offence should not necessarily be punished by a penalty of twenty dollars, but by such penalty, not more than twenty dollars nor less than ten dollars, as the court should direct. That the provision of the former act by which the penalty was fixed was inconsistent with the provision of the latter, and by the terms of the latter repealed. Smith's Comm., sect. 776."

That is the rule of interpretation as enunciated when the party was charged with misdemeanor, yet it is the settled rule of interpretation in all cases as to the effect of statutes.

Let us apply the test to this case, wherein a man has been tried, and a verdict returned against him demanding the forfeiture, not of \$20, but of his life. If, prior to the Constitution of 1869, the penalty of murder in the first degree was absolute and imperative in its declaration of the death-penalty, not admitting of a latitude of discretion, and after the adoption of the Constitution it was no longer death absolutely, but did admit of a latitude of discretion in allowing the jury to find the defendant guilty, and assess either the death-penalty, or imprisonment for life in the penitentiary, as they should see proper, then we certainly think that a new and entirely different penalty had been prescribed, and, if inconsistent with the former penalty, the former was certainly repealed. And, as we said before, it is immaterial whether this repeal had been effected by the Constitution or by legislative enactment; because, when we come to consider the construction of statutes as to repeals, there is no distinction to be drawn between statutes as made by a Constitutional Convention and statutes made

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by the act of the Legislature. The only thing that we are required to look to is the effect of the repeal.

If the two penalties are inconsistent, or a new penalty, though embracing a former, has been enacted, then the former is as completely wiped out as if it had never existed. *Horan v. The State*, 11 Texas, 144; Smith's Comm., sects. 767, 776; Sedgw. on Stat. & Const. Law, 124, 125, 128, 129.

We have considered the effect of the Constitution of 1869 upon the penalty as it existed before the adoption of that instrument. We will now consider the effect of the new Constitution of 1876 upon the Constitution of 1869, and the act of 1856 prescribing the penalty to murder in the first degree; and this brings us directly to the "question," is there any penalty to murder in the first degree in this State?

By the adoption of the Constitution of 1876, every section of the Constitution of 1869 was abrogated which is not found to be engrafted in the former.

The Constitution of 1876 contains no such provision as that of sect. 8, art. 5, of the former Constitution, and therefore the failure to express this provision, or its substance, must be held to be an abrogation of that section.

Therefore the penalty of death as an absolute penalty having been changed or repealed by the Constitution of 1869 prescribing a different penalty, and the Constitution of 1869 having been abrogated by the adoption of the Constitution of 1876, we have to-day no penalty for murder in the first degree, because an abrogation of the Constitution carries with it in its overthrow the penalty prescribed in it, and that also formerly prescribed by the statutes.

It has been held that a statute may be repealed by the abrogation of a State constitution. Sedgw. on Stat. & Const. Law, 128; *Pierce v. Delameter*, 1 Comst. 17.

By the rule of construction of the common law the abrogation of the Constitution, or, in other words, the repeal of

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the statute creating the penalty, would restore the former penalty, and murder of the first degree would therefore be death; but our statute has overthrown this common-law rule by the adoption of another, to wit: whenever one law which shall have repealed another shall itself be repealed, the former law shall not be revived without express words to that effect. Pasc. Dig., art. 4577.

Therefore the penalty of murder in the first degree cannot be revived by the abrogation of the Constitution of 1869. It is true that sect. 48, art. 16, of the Constitution of 1876 says that "all laws and parts of laws now in force in the State of Texas, which are not repugnant to the Constitution of the United States or to this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation or shall be annulled or repealed by the Legislature."

This section can and only does refer to those laws in force at the adoption of this Constitution. No one will seriously contend that its object is to revive every thing found upon the statute-book of this State; and as the penalty had been changed by the Constitution of 1869, and the former penalty repealed, of course this section can have no applicability to the former penalty. When a statute contains a provision saving from repeal a part of a former statute which had been already repealed, such a provision will be regarded as a nullity, and will not operate as a revivor of the repealed clause thus attempted to be revived. Smith's Comm. 784; *Achley's Case*, 4 Pick. 21.

It is said that statutes of a penal character, and especially those of grave penalties, should never be construed; because the very fact of construction being necessary shows the uncertainty of the law, and therefore when the law is uncertain, a person should not be convicted. Not only is this the rule laid down in the text-books, but is the rule prescribed by our statute, which we will call attention to before we are through. In criminal cases, the question of doubt applies

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with equal force as well to the penalty as to the facts upon which a conviction is sought. In other words, while it is the certainty of the facts which go to establish the guilt, it is the certainty of the penalty which authorizes the punishment; and while if there is a doubt as to whether the facts establish the act the jury must acquit, it is equally true that if the penalty is so framed as to be of doubtful force, no judgment can be pronounced. Smith's Comm. 741.

Because, if we are allowed to extend a penalty to an offence when there is an uncertainty as to whether it has a penalty or not, it is as an eminent judge said: "The fate of accused persons is decided by the arbitrary discretion of judges, and not by express authority of law."

The general words of a penal statute must be restrained for the benefit of him against whom the penalty is inflicted. It is said if the rule be one of the higher sort of maxims that are *regulæ rationales*, and not *positiva*, then the law will rather allow a particular offence to escape without punishment than violate such a rule.

When we turn to our Criminal Code, the very first section we encounter reads as follows: "The design of enacting this Code is to define in plain language every offence against the laws of the State, and to affix to each its proper punishment."

Again, art. 3: "In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission as a penal offence unless the same is expressly defined and the penalty affixed by the written laws of this State."

Again, art. 6: "Whenever it appears that a provision of the penal law is so indefinitely framed, or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the State, such penal law shall be regarded as wholly inoperative."

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Again, art. 9: "This Code, and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offence which is not made penal by the plain import of the words of the law."

These four articles give us the rule by which penal laws in this State must be construed; in other words, they cut off all construction, and make it the duty of the court, in a case where there is doubt as to the penalty, to acquit the defendant of the offence, the import of which is doubtful.

We therefore believe that, to say the least, the penalty of murder in the first degree is not so certainly established and fixed as to be able "to read it as we run;" and, to say the least, we are bound to resort to construction, and liberally in behalf of the State, to say that the penalty of murder in the first degree is death. We cannot see how such a construction would be given to the statutes, in the face of the Constitution of 1869, when its effect is regulated not only by the common law and the usual rule in its application to repeals, but is regulated by art. 19, Criminal Code, which says: "No penalty affixed to one offence by one law shall be considered as cumulative of penalties prescribed under a former law; and in every case when a new penalty is prescribed for an offence, the penalty of the first law shall be considered as repealed, unless the contrary be expressly provided in the last enacted."

This law establishes clearly that this former penalty for murder in the first degree had been repealed by the substitution of a different one, by the Constitution of 1869.

But assuming, for the sake of argument, that in this State the courts are permitted to construe statutes of a penal character, yet the construction must be of the most strict and rigid nature when the life of a human being is in jeopardy. If the penalty has been abrogated by the Consti-

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tution of 1876, then no punishment for this offence can be inflicted, because art. 15 of the Criminal Code declares not.

We see but one way to avoid holding that the penalty for murder in the first degree is gone, and that is, as contended by some writers upon constitutional law, to draw the distinction between that which is strictly organic or constitutional and that which is purely of a legislative nature, and hold that that which is of a legislative nature in the Constitution is not to be affected by the change of constitutions; and that that portion of the Constitution of 1869 which affected the penalty for capital offences, being of this legislative character, still remains unaffected by the Constitution of 1876, still giving the jury the right to substitute imprisonment at hard labor in the penitentiary in lieu of the death-penalty.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The position assumed in the briefs of counsel for appellant, and maintained upon principle and authority, that by a change of constitutions in 1876 the penalty for murder in the first degree was entirely abrogated, and that until the adoption of the Revised Penal Code, which took effect on July 24, 1879, there was no penalty affixed to the offence of murder in the first degree by the laws of this State, has already been carefully considered and substantially settled in the case of *Cox et al. v. The State*, decided at our last Austin term, but not yet reported. A mere reference to the opinion in that case might well suffice for a proper disposition of the question in this case; but as the position is so strenuously insisted upon, and the question seems still regarded as open, it is deemed not inappropriate to reëxamine the question, and to give a further expression to the views entertained by this court, in addition to the views already expressed by the learned judge who delivered the opinion in the case referred to.

Prior to the adoption of the Constitution which took

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effect on the thirtieth day of March, 1870, the punishment for murder in the first degree was fixed by the law at death. Penal Code, art. 612a. Art. 5, sect. 8, of that instrument provided as follows: "In the trial of all criminal cases, the jury trying the same shall find and assess the amount of punishment to be inflicted, or fine to be imposed, except in cases where the punishment or fine shall be specifically imposed by law; *provided*, that in all cases where by law it may be provided that capital punishment may be inflicted, the jury shall have the right, in their discretion, to substitute imprisonment at hard labor for life." The Constitution of 1870 was abrogated by our present Constitution, which went into operation on the eighteenth day of April, 1876, and which omitted the above provision altogether.

It is now contended that when the Constitution of 1870 became the organic law of this State, the above provision became a part and parcel of the law affixing a penalty to the offence of murder in the first degree, interwoven and blended with the statute as inseparably and thoroughly, and perhaps more solemnly, than if placed there by ordinary legislative enactment, and that with its repeal, in 1876, the penalty for murder in the first degree fell with it. In other words, that between the eighteenth day of April, 1876, and the twenty-fourth day of July, 1879, our law affixed no penalty whatsoever to the offence of murder in the first degree, and that such offences committed within the stated interval cannot now be punished; or, if this be not so, the provision in the Constitution of 1870, having been carried into the statute as a part of the penalty for murder, was continued in operation by the provision of art. 16, sect. 48, of our present Constitution, which continues in force all existing laws and parts of laws not repugnant to its provisions; and that the law applicable to this case was not given to the jury, there having been no instruction as to the alternative penalty for murder in the first degree.

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Authorities are not necessary to support the proposition that in the interpretation of written constitutions, as well as of statutes, the true inquiry is to ascertain the intention of the law-making power, in order to give it proper effect; or, in the language of Judge Cooley, "the object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley's Const. Lim. 55. True, this intent is to be found in the instrument itself; but here the rules of construction as applicable to constitutions and to statutes diverge, and those who are charged with the duty of expounding the former are not authorized to apply to the language employed any technical or abstruse meaning, but are required to give effect to its plain and ordinary signification. Says Judge Story, in his Commentaries: "Constitutions are not designed for metaphysical or logical subtilties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." Story on Const., sect. 451. Or, as said by the court in Alabama, quoting from Chief Justice Gibson: "A constitution is not to receive a technical construction, like a common-law instrument or statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them." 34 Ala. 238.

What, then, was the intention of the people in adopting the constitutional provision in question? Was it to amend the statutes in force as to capital felonies, and to prescribe in the organic law that the punishment for those offences should be changed? If so, it is at least reasonable to infer

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that they would have employed language unmistakable in its simplicity. In its adoption they were not performing an act of ordinary legislation, but were engaged in the establishment of fundamental principles of government for themselves, reserving to themselves such powers as they were not willing to delegate, and providing the general features of that system which in their judgment was best conducive to their future happiness and prosperity. In their sovereign capacity, and keeping even pace with the humane spirit of the age, they provided that their jurors, in the trial of persons charged with capital felonies, and notwithstanding the legal penalty affixed to the offence might be death absolutely, might yet, in the exercise of a humane discretion granted them directly by the people themselves, substitute imprisonment for life for the penalty affixed by law. This privilege or discretion, which may be styled a part of the penalty or one of the penalties in all cases punished capitally under the law, partook rather of the grace of the sovereign which decreed its exercise, in all proper cases, in spite of the fixed and absolute penalty prescribed by law, and in mitigation thereof. It was not only proper but necessary that, in all prosecutions for capital offences committed during its existence in the organic law, the jury should be informed of its existence as a part of the law applicable to the case, in order that they might exercise their discretion in affixing the punishment; but it by no means follows as a necessary consequence that it became so firmly imbedded in the statutes, as part and parcel thereof, that the abrogation of the organic law in which it was contained left it transplanted in those statutes, and firmly imbedded as a part of the fixed law for that class of offences. We know of no rule of law tending to sustain such construction.

In the adoption of our present Constitution, the people omitted this provision contained in the former instrument, and expressly continued in force all laws not repugnant to

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the provisions of the new instrument. Const., art. 16, sect. 48. The effect of the adoption of the new Constitution was an entire abrogation of the old, except as to provisions reenacted in the new, and such provisions as by the terms of the new Constitution were continued in force and operation. *The State v. McAdoo*, 36 Mo. 454; *Smith v. Davis et al.*, 28 Md. 244; *Pierce v. Delamater*, 1 Comst. 18. If the terms "all laws and parts of laws," as employed in sect. 48 of art. 16 of the Constitution, and which were continued in force not being repugnant to its provisions, can be construed to include the provision in the former Constitution relating to the substitution of imprisonment for death in capital cases, as not repugnant to the provisions of the present Constitution, other provisions of the abrogated instrument could with equal propriety be invoked as existing law, and the basis of rights accruing and to accrue, until the Legislature might see fit to extinguish them by express repeal, if that was competent. And the will of the people who caused to be framed and adopted an instrument of organic law, as an entirety, would be set at naught by the resurrection of provisions in the dead instrument which had been designedly discarded and omitted from the new under the well-grounded assumption that such omission operated as an abrogation. Even a statute which is evidently intended as a substitute for a former statute, and which omits any provision contained in the former statute, is uniformly held to operate a repeal of the provision omitted.

Certainly there can be no mistake as to the intention of the people in the adoption of the present Constitution as an entire substitute for the one under which they had previously lived. And such is the legal effect of the adoption of a new Constitution, according to all the authorities to which we have had access. Say the Supreme Court of Missouri in the case of *McAdoo*, above cited: "The present Constitution, when it took effect on the fourth of July last,

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was from that date the supreme law of the land, and applied to all subjects not exempted from its operation. The old Constitution was entirely superseded by the new, and its power or authority cannot be invoked in the matter." "A constitution," say the Court of Appeals of New York, "is to be held as prepared and adopted in reference to existing statutory laws, upon the provisions of which in detail it must depend to be set in practical operation." *The People v. Jackson*, 47 N. Y. 380. See also *Collins v. Tracy*, 36 Texas, 546.

To the same effect is the language of Judge Thurman, in delivering the opinion of the court in *Cass v. Dillon*, which involved the continued existence of a statute under a new constitution. Says this eminent constitutional lawyer: "If the laws of a conquered country remain in force until repealed, so far as they are consistent with the government of the conquerors, *à fortiori* is it true that the laws of a State survive a peaceable change of its constitution, effected by its own people, and not varying the general structure of its government, to the full extent to which they are consistent with the new order of things." 2 Ohio St. 610.

But conceding the point insisted upon in this case, that the provision under discussion, in the Constitution of 1870, was not fundamental but legislative in its character, we cannot hold that it survived the abrogation of that Constitution. Under that aspect of the case, its legal effect may be thus stated: Under the act of 1858 the punishment for murder in the first degree was fixed at death. By legislative act of the convention of 1869 it was provided, not by an amendment of the original law, but by supplemental act, that, notwithstanding the previous law, which is left in force, imprisonment for life may be substituted for the death-penalty. After the lapse of six years the supplemental act is repealed. How is the other separate and independent provision affected by such repeal? Without such constitutional provision, it was competent for the Leg-

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islature at any time to have supplemented the act of 1858 by a separate statutory provision of similar import to the one contained in the Constitution, and a subsequent legislative repeal of the supplemental act, without reference to or qualification of the former law, could not be held to have affected that former law. If, therefore, this provision was legislative, it was independent in its nature, not intended to be and become a part of the statute in force or thereafter passed as to capital felonies, and its repeal or abrogation left the former statutes fully vitalized and continued in force and effect by express provision in the new Constitution. That such was the clear intention of the people in the adoption of the present Constitution is unmistakable; and neither this court nor any other court could find justification in overriding this plainly expressed intention, and in giving to this act of the people a strained and wholly technical signification never contemplated or intended, and which leads to an absurdity in that it would inevitably defeat the great principles of government, among which the protection of life is perhaps the most essential. There was no error in failing to charge the law as contended for.

It is no new principle in the law of this State that to justify a conviction upon circumstantial evidence alone the facts relied on must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. *Barnes v. The State*, 41 Texas, 342; *Black v. The State*, 1 Texas Ct. App. 391. If this be so, certainly a jury called to pass upon a case of that character should be informed of the rule as a part of the law applicable to the case. An ordinary charge upon the law of reasonable doubt, copied from the statute, cannot convey to their minds a clear conception of this exaction of the law, when a conviction is sought upon circumstantial testimony alone; and without some definite rule for their guidance—a rule which will serve to impress itself on their minds, and cause them to weigh most

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carefully all the facts, isolated or connected, from which they must reach their conclusion by reasonable inference—they are not unlikely, in many instances, to found their verdict upon strong suspicion or mere probability, which will not suffice under the law. *Tollett v. The State*, 44 Texas, 95.

In prosecutions for ordinary felonies, juries are required to be instructed as to the law of reasonable doubt, even when the evidence is of a positive character and can lead to but one legitimate conclusion. It is much more essential, in a prosecution in which nothing is proved by positive testimony save the *corpus delicti*, that the jury be further instructed as to the conviction which must impress itself upon their minds, drawn by inference from the circumstances in evidence, before they can say that, beyond a reasonable doubt, the prisoner before them perpetrated the act. And it is believed that the adjudged cases in our State furnish no instance of a conviction for a grave felony upon circumstantial testimony alone, unless the charge of the court plainly directed the jury as to the principles of law which should govern them in reaching their conclusion; and we have already held it error to refuse a charge of this character when asked in a proper case. *Harrison v. The State*, 6 Texas Ct. App. 42.

In the case of *Burrell*, 18 Texas, 713, the judgment was reversed as to the appellant Burns because the only evidence tending to inculcate him was circumstantial, and the court failed to instruct the jury upon its effect, notwithstanding they were instructed that “circumstantial testimony must tend closely to prove the fact, or it is not of itself sufficient, but may still be entitled to great weight in connection with positive testimony.”

In *Cave v. The State*, 41 Texas, 182, it is laid down that, in cases dependent upon circumstantial evidence, full instruction upon that branch of the law is requisite and essential. It is noticeable that in that case the evidence was not

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wholly circumstantial, and yet the jury were substantially instructed as to that species of evidence.

In *Brown v. The State*, 23 Texas, 195, in which the evidence was wholly circumstantial, the rule in Webster's case was not given to the jury; but the learned judge who presided on the trial, after stating the law as to reasonable doubt very fully, instructed the jury that all the material facts proved to their satisfaction ought to lead to the conclusion that the prisoner did the deed, to the exclusion of a reasonable belief that he did not or that some other person did it, and that if the evidence satisfied their minds and consciences that the accused did kill the deceased, and did not show that some other person had a motive to do it and might have done it, then it was sufficient to find the fact.

It is true that in *Chester v. The State*, 1 Texas Ct. App. 702, this court held that in the case before them it was not necessary for the jury to be instructed as to circumstantial evidence; but in that case, which was a case of theft, the evidence was not wholly circumstantial, and the decision must be restricted to the case before the court, and not be construed as the enunciation of a general principle for the guidance of courts in all cases.

The usual rule in relation to circumstantial evidence, which is a familiar one to the profession, cannot be deemed a philosophic dissertation upon the nature and effect of evidence, and therefore within the prohibition of the Code as an invasion of the province of the jury, but is to be regarded rather as a rule of law applicable to all cases in which a conviction is sought upon circumstantial evidence alone, and the giving of which to a jury, in the general language usually employed, cannot specially affect any one fact in evidence or materially prejudice the prosecution. And when given, enuring solely to the benefit of the defendant, he cannot be heard to complain. It is only another application of the doctrine of reasonable doubt, which the humanity of the law vouchsafes to prisoners on trial, when

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the evidence against them is wholly circumstantial ; and an instruction embodying it simply informs the jury what degree of certainty the facts in the evidence must produce in their minds before they can convict, just as a charge upon the reasonable doubt does in ordinary cases. The failure of the court to give an instruction upon this branch of the law was error which will require a reversal of the judgment.

The general charge of the court is complained of as not embodying an accurate definition of murder with express malice, and in failing to define clearly the distinction between the two degrees of murder. As this opinion is already extended in the discussion of other questions, a critical analysis of the charge will not be undertaken. But we are of opinion that, upon another trial, the better practice would be for the court to conform its charge to established precedents in our State, and not undertake a condensation of principles which might omit essentials. While the definition of murder in the first degree as given to the jury might successfully withstand careful analysis, and be upheld as containing the condensed essence of the authorities upon the subject, we are of opinion that the mere difficulty experienced in the attempt at such adaptation sufficiently indicates that fuller explanations should have been given to the jury as to the necessary constituents of the two degrees of murder.

It is never safe to depart from established authorities in giving instructions to a jury, and in prosecutions for murder in this State, the law has been so fully and plainly settled by repeated decisions that courts cannot err if they but employ the language of standard cases in the exposition of principles which are to govern the jury. The other errors assigned are not deemed material.

Because of a failure of the court to charge the law applicable to the case, the judgment is reversed and the cause remanded.

Reversed and remanded.

Statement of the case.

HARRY SHAFFER v. THE STATE.

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1. **CHALLENGE FOR CAUSE.** — Conscientious scruples in regard to the infliction of death as a punishment for crime constitute cause for the challenge of a juror in a capital case, even though the juror limit his scruples to cases in which circumstantial evidence is relied upon for a conviction.
2. **BURDEN OF PROOF.** — Upon the issue of guilty or not guilty, the burden of proof never shifts from the State to the defendant, but remains upon the State throughout the trial.
3. **CONFESSIONS,** though made in arrest or jail, are evidence against the maker if he made them voluntarily and after being cautioned that they might be used against him.

APPEAL from the District Court of Gregg. Tried below before the Hon. J. C. ROBERTSON.

The indictment charged Henry Shafer, the appellant, with the murder of Houston Heard, on December 1, 1878, by striking him on the head with a stick of wood.

The appellant and the deceased, as well as one William Hester, commonly called Wild Bill, and who is implicated by the evidence, though not on trial, were negroes, who, it is inferable from the evidence, were laborers in the neighborhood of Longview in Gregg County. Appellant and the deceased left Longview together, on foot, taking the track of the Texas and Pacific Railroad towards Marshall. This was about an hour after sunrise on the day of the homicide. A few minutes after they started, Hester followed them, making inquiry for them of a witness, and walking off rapidly to overtake them. Very soon afterwards all three were seen sitting down together near the track, and afterwards proceeding together along the track. In an hour or so, Heard was found dead in a "cut," about a mile and a half from Longview. His head was crushed in, and a thick bludgeon was lying near him, with hair and blood upon it. The tracks of two men led from the body up the bank of the cut, indicating the route taken by those who committed the deed, and, being speedily fol-

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lowed, led the officers first to Hester, and before night to the appellant. One of the tracks at the cut was identified as the appellant's; and on his person was found a pocket-book belonging to the wife of the deceased, who had confided it to her husband the day previously, with some \$70 of their joint money. When overtaken and summoned to surrender, the defendant ran, but was stopped by a shot which inflicted a slight flesh-wound in his shoulder. After his wound was dressed, and while he was in custody, he persisted in making a statement to the officer, though repeatedly warned that what he should say might be used against him. He said that Hester killed the deceased with the bludgeon, because the deceased was advancing on him (Hester) with a knife, they having renewed a quarrel commenced the previous evening about \$2.50 due the deceased by Hester. Defendant said that he tried to keep down the fuss between Hester and the deceased, and was sitting down twenty steps from them when they encountered each other; that he and Hester took to the woods after the blow was struck by the former. He attempted no explanation of his flight without giving information of the homicide, nor in any way accounted for his possession of the pocket-book found upon him.

The jury returned a verdict of murder in the first degree, and judgment of death was rendered against the appellant. The opinion of this court discloses all special matters of significance.

Pope & Pope, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. This appeal is from a judgment of conviction of murder in the first degree, after a motion for new trial overruled. Several questions are presented by the record, a discussion of which would not tend to settle any proposition of law, or determine any legal right of the

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appellant. Such matters as are considered of any moment will be noticed so far as deemed necessary, under all the facts and circumstances disclosed by the record.

Whilst the jury was being formed for the trial below, one Campbell, returned on the special *venire*, on his examination as a juror, in answer to a question by the State's counsel, stated that he had conscientious scruples in regard to the punishment of death for crime, in cases dependent on circumstantial testimony, whereupon he was stood aside by the court; and this action of the court was excepted to by the defendant's counsel. One of the grounds of challenge for cause specified in the Code is, "that the juror has conscientious scruples in regard to the infliction of the punishment of death for crime." Rev. Code Cr. Proc., art. 636, cl. 11 (identical with cl. 7, art. 3041, Pasc. Dig., which was in force at the time of the trial below). The court did not err in standing the juror aside; he was, under the law, liable to challenge for cause when offered as a juror for the trial of a capital case. No other objection appears to have been taken to any juror, or to any other proceeding in the formation of the jury, and none is perceived.

Complaint is made that the court erred in admitting certain testimony of the State's witness Davis. The matter is stated in the bill of exceptions substantially as follows: "The court allowed the State's counsel to ask the witness Edmund Davis what had been said to him by one Wm. Hester on the morning that witness saw defendant, in reference to where said Hester was going." By considering the objection in connection with the testimony of this witness, as set out in the statement of facts, it will be seen that it was altogether unimportant one way or the other, and could have had no appreciable value upon the verdict. Still we are of opinion the court did not err in admitting it for what it was worth as tending to throw light upon the transactions which were then undergoing investigation.

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The general charge of the court was excepted to at the trial, and certain special instructions were asked by the defendant's counsel, which the court refused to give to the jury; and to the refusal a bill of exceptions was taken. There is but one matter relating to the charge as given, or those refused, which it is deemed important to notice, and this one would not be mentioned except that it might hereafter afford an erroneous precedent. The court, in treating of implied malice in connection with the subject of murder in the second degree, uses this language: "The presumption of implied malice arises in the absence of those circumstances which show express malice; and the burden of proof is then shifted on the defendant, and it devolves upon him to show that the act was committed under such circumstances as would reduce the offence from murder to manslaughter, negligent, excusable, or justifiable homicide."

It would be too broad an assertion to say that in criminal trials the burden of proof never, under any state of case, is shifted from the State to the defendant; but in so far as the question of guilt of one who stands before the court on a plea of not guilty is concerned it may be truly said that the burden of proof never shifts, but rests upon the State throughout to fasten guilt upon the accused by evidence sufficient to satisfy the minds of the jury beyond a reasonable doubt that he is guilty, else under the law he is entitled to be acquitted. *Ake v. The State*, 6 Texas Ct. App. 398.

Under the circumstances detailed in evidence in the present case, and hedged about as it is by preceding and succeeding portions of the charge, it is hardly possible that the jury could have been misled by the extract above set out. With this unimportant defect, the charge is an elaborate and carefully written enunciation of the law, and, taken as a whole, gave the jury appropriate instructions as to every phase of the testimony on murder in the second degree, manslaughter, and self-defence, but especially as to that portion of the charge which relates to murder in the first

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degree; as to which no objection is made, nor is any perceived. The jury were also instructed on the subject of circumstantial testimony, and the degree of certainty required by law to warrant a conviction on this character of evidence, as well as on the presumption of innocence and reasonable doubt, as to murder in the first degree as well as between the degrees and on the whole case.

The following testimony of statements of the defendant was admitted over objection as not having been voluntarily made. It seems that after the homicide the defendant was intercepted near his home by a deputy-sheriff and another person, and, when called on to surrender, ran, and was fired on and wounded,—a flesh-wound in the shoulder. This occurred on the night following the homicide, which had occurred in the morning. The defendant was arrested near his home, in Harrison County, and taken to Longview in Gregg County, and the deputy-sheriff sent for a doctor to dress his wound. The deputy, speaking of the defendant, in testifying, says he “seemed to want to talk, and commenced talking, when I warned him and cautioned him not to say any thing, for if he did that it would be used against him. He said he wanted to tell all about it. I again warned him that what he said would be used against him.” And the witness proceeded to recount a trouble between the deceased and another man on the evening previous to the killing, and which, he said, was renewed between them just before the killing took place, and that this certain person struck the blow that killed the deceased.

If there was error here, it certainly must have enured to the benefit of the defendant. If the other person implicated had been on trial, he might have objected to the statement; but not so the defendant. But in so far as the question whether the statements of the defendant were voluntarily made or not is concerned, they were admissible under the statute. A confession, though made by one in jail, or other place of confinement, may be used in evidence against

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him, *if made voluntarily, after having been first cautioned that it may be used against him.* Rev. Code Cr. Proc., art. 750; Pasc. Dig., art. 3127, note 761. The testimony of the deputy-sheriff, as above set out, shows that the statements of the defendant were voluntarily made, and after he had first been cautioned that they would be used against him.

It seems that the defendant, by this statement, got its full benefit, not only by getting it before the jury, but by having the subject submitted under an appropriate instruction. Under these circumstances, we are unable to see that his rights have been prejudiced or that he has any just grounds of complaint. In this respect, as well as in others, the action of the court was most favorable towards the defendant. In fact, the whole case shows a scrupulous regard for the rights of the defendant.

It is intimated in the assignment of errors that the indictment only charges manslaughter, and not murder. No defect in the indictment has been pointed out at any stage of the proceedings, so far as the record shows, and none is apparent; on the contrary, it seems to be sufficient to support a conviction for murder in the first degree. It is shown to have been returned into court by the grand jury in a body, a quorum being present, and charges murder with express malice.

The sufficiency of the evidence is called in question by the motion for a new trial. From the testimony, and from the charge of the court on the subject of more than one person acting together in the commission of crime, it is apparent that there was another person besides the defendant present and participating in taking the life of the deceased; and if a motive for the commission of the deed were otherwise wanting, we are of opinion that any apparent defect was supplied by the testimony of the wife of the deceased as to his money and pocket-book, and that of the deputy-sheriff that this same pocket-book was found on the

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person of the defendant at the time of his arrest. At any rate, we are not prepared to say that the jury were not warranted by the testimony in finding that the money of the deceased formed an important element in his taking off. We are of opinion that there is no room for doubt that the deceased came to his death by violent means, and that, from the circumstances proved, the defendant was one of the persons present at the time. As to whether he participated in the act of murder or not, the question was fairly submitted to the jury by the charge of the court, and on this branch of the case we are unable to say that the verdict of the jury is without a sufficient amount of legal evidence to support it. The whole case, both as to the law and the testimony, after the jury had returned a verdict of guilty of murder in the first degree, was passed in review on the hearing of the motion for a new trial, and the court, at this solemn stage of the proceeding, refused to set the verdict aside and grant a new trial; and, after a careful consideration of the case as presented in the record before us, we are constrained to say that the life of the accused has been forfeited by due course of law.

The judgment of the District Court is affirmed.

Affirmed.

BILL WALKER v. THE STATE.

1. MURDER IN THE FIRST DEGREE — EFFECT OF REVISED CODE ON PENDING CONVICTIONS. — In 1878, the appellant, having been convicted of murder in the first degree, appealed from the capital judgment against him, and his appeal was still pending in this court on July 24, 1879, when the Revised Penal Code took effect and changed the previous penalty for the offence from "death" to "death or confinement in the penitentiary for life." It is insisted in his behalf that this change repealed the previous law, and thereby operates immunity to him from the penalty imposed by virtue of the law so repealed. But, *held*, on principle as well as authority, and conclusively in view of sect. 6 of the "Final Title" of the Revised Statutes, that the change so made in the penalty for murder in the first degree does

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- not invalidate the conviction of the appellant, nor exempt him from the penalty adjudged against him, by any retrospective operation or otherwise.
2. **CONSTRUCTION OF STATUTES.** — The legislative intention is the objective point of all rules and principles for the construction and interpretation of statutes; and, avoiding irrational deductions and absurd results, these rules and principles must be applied in subordination to the legislative intention. See the opinion in full on this topic, with especial reference to the effect on previous laws of the adoption of the Revised Statutes and Codes.
8. **REPEAL OF STATUTES** by implication is not favored, and to operate such a repeal the repugnancy must be plain, unavoidable, and irreconcilable.
4. **NEW TRIAL.** — **SURPRISE** is not cause for new trial in this State; but by express provision of the Code it may, though it arises after the commencement of the trial, entitle the party to a continuance or to a postponement of the trial.
5. **CONFESSIONS.** — No inflexible rule controls the admission of a subsequent confession made after a previous one had been induced by improper influence. In such cases the inquiry is whether, in view of all the circumstances, the improper influence had been so expurgated as to remove all doubt of the spontaneity of the last confession. If this admits of a doubt, the confession should be excluded.
6. **PRACTICE IN THIS COURT.** — Exception cannot be primarily taken in this court to the competency of evidence admitted at the trial below. The exception must be duly taken at the time, and be brought up in the record, to invoke the revisory power of this court.
7. **MURDER — EVIDENCE.** — In a trial for murder, the prosecution proved that footprints were found on the premises where the assassination had been perpetrated, and was further allowed, over objection by the defence, to prove that the examining magistrate compelled the defendant to make his footprints in an ash-heap, and that the footprints so made corresponded with those found on the premises where the homicide was committed. It is objected that the evidence was incompetent because violative of the guaranty in the Bill of Rights that "one accused of crime shall not be compelled to give evidence against himself." But *held*, on review of the authorities, that the objection is not well taken, nor the evidence within the inhibition of the Bill of Rights. Note the distinction taken between this case and that of *Stokes v. The State*, Supreme Court of Tennessee, not yet reported.

APPEAL from the District Court of Robertson. Tried below before the Hon. S. FORD.

At the December term, 1876, the appellant was indicted for the murder of James Munroe, on August 19, 1876, by striking and cutting him with a hoe. Upon his first trial,

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which was had at the January term, 1877, he was found guilty of murder in the first degree, and adjudged to suffer death. On his appeal from that judgment to this court, he obtained a new trial on grounds which are disclosed in the report of the case in 2 Texas Ct. App. 326. The second trial was had in June, 1878, and also resulted in the conviction of the appellant of murder in the first degree, and judgment of death; and he again appeals, upon grounds indicated in the opinion of the court.

The first witness for the State was John Perry, who testified that he knew James Munroe, and that he came to his death on August 19, 1876, at his home in Robertson County. During the preceding evening, when the sun was about an hour and a half high, witness saw Munroe at the latter's home; and on the next morning saw him lying on his bed in his own house, murdered. His wound was about the head, near the ear, and was made by a blow with some hard instrument; the head seemed to have been mashed. He was lying diagonally across the bed, speechless, but struggling occasionally. He was in his night-clothes, and could not have travelled after the blow was inflicted on him. Witness saw blood on the floor and bed, but observed none on the walls. The deceased was not bleeding much when witness saw him, but had been previously. The wound could have been made with an iron grubbing-hoe. No person had been in the room that morning, before witness. Susan Smith had called for McClain, and the latter had called to witness, saying that something was wrong at Munroe's. Witness called at the edge of the gallery, and then went on the gallery and called again. The door was closed, and he pushed it open and looked in, and then saw some keys lying on the floor, by a half-open trunk, which he did not examine. A pair of pants, with blood on them, lay behind the door, and a knife, he thinks, was lying by them. A dog was tied to the gallery post with a small rope, and a pile of seed-cotton was on the left end of the gallery as one

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would enter the house. Witness made no search for tracks. He had, in the preceding spring, known the defendant, who then went by the name of Henry Walker, but who, after his arrest, went by the name of Bill Walker. The defendant had stayed with deceased for some time during the spring preceding the murder. Besides the front-door leading into the room where the deceased was found, there was another door, which led from that room to another one, in which there was a window. Witness thinks there was no window to the room in which the deceased was lying.

Susan Smith, for the State, testified that she lived on the place of the deceased, and saw him sitting on his gallery between eight and nine o'clock the night before he was killed, and he then seemed to be well. He was an old man. A little after sunrise the next morning, witness went to milk the deceased's cows, and, hearing a noise in the house, went to the door and knocked, but got no answer. Witness heard a struggling in the house. She then went to the cow-pen and called Mr. McClain, who called Mr. Perry, and the latter and witness went towards the house. Witness stopped at the gate, and cannot say who entered the house next after Perry.

George Grimes, for the State, testified that he knew the deceased, and went to the latter's house the morning he was murdered, about two hours after sunrise. This witness found the deceased in the position and condition described previously by Perry, and also saw the keys, pants, and knife mentioned by the latter. Witness and John Sanders, searching for tracks, went to the peach-orchard, and there found tracks which witness knew to be strange tracks on the premises. Some of them looked like the tracks of run-down boots, and others like barefoot tracks. Witness returned to the window of the dining-room, and near the window saw barefoot tracks, as though some one had stood upon his toes, and there was a hole in the ground which might have been made by a bar of iron used to get into the

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window. Witness next entered the room where the deceased was lying, and there saw the barefoot tracks in some ashes in the fireplace. He then went out and trailed the track through the garden-gate to the peach-orchard. The person had walked all over the orchard. Witness followed the tracks through a cotton-field on the north of the house, and there they took a trail for some distance towards Miles Kelly's house. Witness cut a stick and stuck it in the track, so that he could identify it again, and then returned to inform George Brown and Mr. Callen. The latter cut a cotton-stalk and measured the track. Witness saw the same measure applied to a track in Judge Joiner's office at Bremond. Joiner made the defendant make his track in the ashes and sand in his office, where a stove had been. The impression made was plain, and about the same as the tracks found in the deceased's house. The measure was applied to the footprint in Joiner's office, and it was the same in every particular,—fitted it exactly. Witness could not tell much about the track found at the window, but measured it across the impression of the toes. The track in Joiner's office corresponded with that of the toes at the window, and with the track found in the orchard. Witness did not measure the boot-track. On cross-examination, the witness said a person could change his track in his walk, but he could tell whether a track was a natural one or not. The defendant was under arrest when Joiner made him make the tracks. On reëxamination, he said the tracks he found were natural tracks.

Mary Killen recognized the defendant, and lived on the same place that he did at the time Munroe was murdered. Defendant had cleaned out a well, and witness rinsed the mud off his clothes after he cleaned the well. Witness had washed his clothes three or four times; they were a coarse striped shirt and white pants. After rinsing the defendant's clothes on the occasion mentioned, witness saw them in Judge Joiner's office in Bremond; she knew them by the

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mud on them. The defendant went off the Thursday night next before the Saturday night when Munroe was killed. The following Sunday morning, a half-hour by sun, witness saw him again ; he came from towards Bremond, and was wearing some new clothes. He brought to witness's daughter a new dress, hat, underskirt, and pair of shoes. On her cross-examination, she said the defendant had some money when he went off the Thursday before the killing.

O. C. Morehead, for the State, testified that about a month before the homicide he paid \$20 to the deceased for cattle, and there were three five-dollar bills in the amount. Witness had a five-dollar bill with a hole punched in it, and similar to the bill now shown him in court. Witness got the bill from his meat-market, and kept his money derived from that source separate from his other money. He paid Munroe out of the market-money, but could not say that the bill in question was part of the money he paid him. Knows, however, that he paid out the punched bill about that time, and does not remember of then having made any payments out of his market-money other than the payment to Munroe. On cross-examination, he stated that his only reason for saying that he paid the punched bill to Munroe was that he bought all his cattle from Munroe.

Mrs. Marstrandt, for the State, testified that in 1876 she was merchandising in Bremond, and saw the defendant in her store at sunrise the Sunday morning when Munroe was killed. Defendant woke up witness's husband, to sell him some goods. Witness was called by her husband to come and get some goods which he could not find. She sold the defendant a dress, an underskirt, hat, shoes, ruffled-bosom shirt, and gray jeans pants. When he came he had on ragged pants and shirt, and witness saw that he needed others. The whole bill amounted to \$11. Witness asked him why he came that time of day ; and he replied that he could not come sooner, for he did not have any money.

George Brown, for the State, testified that he was at

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Munroe's the morning of the homicide, and found Munroe still breathing. Witness was shown some tracks which led off through the orchard and cotton-field, Witness being informed that some bloody clothes had been found in the woods, some two hundred yards from where the defendant lived on Graves's place, he arrested the defendant on the Tuesday after the murder. When arrested, he was wearing a white shirt and blue pants, being the clothing which was identified by Mrs. Marstrandt as the same she sold to him. Seven dollars were found on his person, of which a five-dollar bill with a hole in it was part, — the same bill being here shown to witness and identified by him. Witness was present at the examining trial of the defendant before Judge Joiner for the murder of Munroe. The defendant made a confession at that time. He was cautioned by Judge Joiner that such confession would be used against him on the final trial. He confessed that he and Green Patterson had laid the plan to kill Munroe; that he went with Patterson and peeped through the crack, but did not go in; and that Patterson did the killing. Their object was money, to enable him to carry off Patterson's sister. Witness does not remember whether the defendant said he got any money or not.

On his cross-examination, this witness stated that he knew part of the defendant's confession to be false; but the record does not show to what part of it he had reference. After the confession before the examining court, the defendant made other statements, which implicated different persons with himself. The defendant may have known of threats which had been made.

The defence introduced Mr. Graves, who testified that the defendant was living on his place at the time Munroe was killed, and left there on the Thursday preceding the killing, saying that he was going to Bryan after some clothing and would be back in about a week. Witness had paid him some money, but not more than \$2 or \$3, and thought he could not have had as much as \$20.

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Mr. Nash, for the defence, stated that he knew nothing particular about threats, but that the defendant was somewhat roughly treated and made a confession prior to the confession at Joiner's office.

The jury, as already stated, found the defendant guilty of murder in the first degree. He moved for a new trial, on grounds which are sufficiently indicated in the opinion.

F. H. Prendergast, for the appellant. The first error assigned is that the court should not have allowed George Grimes to testify as to the result of a comparison between tracks found near Munroe's house and a track which the defendant was compelled to make while under arrest. Is it proper for an officer in charge of a prisoner to compel him, or allow him to be compelled, to do any act that will assist the State in convicting him? If the defendant "shall not be compelled to give evidence against himself" (Bill of Rights, sect. 10), how can he be compelled to put the State in possession of any fact which the State says goes to establish his guilt?

In the case of *The State v. Graham*, 74 N. C. 646 (reported in 21 Am. Rep., and in 1 Am. Cr. Rep. by Hawley), the officer compelled the prisoner to put his foot in a track found near where the larceny was committed, and testified to the result of the comparison. The court held the evidence competent, and say (which we say is not correct) that it is similar to a defendant wearing a mask to prevent being identified; and *The Albany Law Journal* of December 1, 1877, dissents from the case, and says in that State a woman was charged with having suffered an abortion and was compelled to submit to a medical examination, and the conviction was set aside. In the case of *Jerre Stokes v. The State*, 2 Texas L. J. 243, the defendant was only requested to give evidence against himself, and the court say that was error. But Bill Walker has been compelled to give evidence against himself, and that evidence has been used to obtain his conviction. In *Stokes v. The*

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State, the State's attorney wanted to prove that the defendant's track would be similar to the tracks found where the crime was committed, and for this purpose brought a pan of mud before the jury and asked the defendant to put his foot in it. This he declined to do, and the judge told the jury that his refusal could not be taken against him. The court say the defendant was asked to give evidence against himself, and reversed the case.

If this defendant can be compelled to make an impression with his foot in order to see if it is similar to the impression made by the foot of the person who committed the crime, then if he were charged with forgery he could be compelled to take a pen and write in order to see if his handwriting was similar to that of the party who had committed the forgery. If this were so, then if he were charged with perjury, and were to deny having spoken the words charged against him, the State would be allowed to ask him what he did say if he did not say those words. The defendant was compelled to make the footprints in Judge Joiner's office; and if the information thereby obtained is offered in evidence against him, sect. 10 of the Bill of Rights protects him.

It is no answer to say that all the information obtained by this compulsion is true, for then you would be polluting the halls of justice with this maxim of modern ethics: that the end justifies the means. If this were law, then a mob might arrest a man charged with theft, and whip him and *hang* him, and if he told where the stolen property was they would be justifiable. But suppose he does not know where it is, then the mob will have punished an innocent man, or at any rate they punish a man before he has a trial. The law has its own officers to administer its punishments under appropriate restrictions; it has certain rules by which the guilt of a person is established; and it absolutely forbids that a defendant should be compelled to give evidence against himself.

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The second assignment of errors is that the confession should not have been admitted. Upon the trial of the cause, the defendant's counsel was much surprised when the State proved that defendant had been cautioned before he confessed. No mention was made of such caution on the former trial (see 2 Texas Ct. App. 326), and I actually never heard of such being the case until the progress of the last trial, when the witness was asked the question. No corroboration was proved this time, and no caution before. In *Boxley v. The Commonwealth*, 24 Gratt. 649 (1 Hawley's Am. Cr. Rep. 655), the court say, where the testimony of the principal prosecuting witness differed materially from that given by her before the committing magistrate, that the prisoner is entitled to a new trial on the ground of surprise. We supposed that in a charge so grave as this the State would consider no amount of evidence plenary, short of the "whole truth," and that George Brown had testified on the former trial to all the material facts in his knowledge; and being thus surprised, I made no formal objection to the admissibility of the evidence. But I think the importance of the case will justify the court in considering the admissibility of this confession, in connection with the weight to be given it. Courts have considered such objections without a bill of exceptions. *Sutton v. The State*, 41 Texas, 513; *Goode v. The State*, 2 Texas Ct. App. 523, and authorities cited.

George McCormick, Attorney-General, for the State.

WHITE, P. J. On a former appeal, this case was reversed because the court below erred in admitting in evidence the confessions of the defendant, because it appeared that the same had not been made in conformity with the rules prescribed by the statute. Pasc. Dig., arts. 3126, 3127. See 2 Texas Ct. App. 326.

A second trial has resulted in a second conviction of

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murder in the first degree, with the death-penalty. This last conviction was obtained by the State on the fourteenth day of June, 1878, and the case was appealed to and filed at the Austin branch of this court on the tenth day of March, 1879, where it was submitted on briefs, taken under advisement, and regularly transferred to this branch. Since the appeal was perfected the entire statute law of the State has been revised, and the punishment for murder in the first degree has been changed from "death" exclusively (Pasc. Dig., art. 2271), to "death or confinement in the penitentiary for life." Rev. Stats., Penal Code, art. 609. In a supplemental brief filed here by the zealous and able counsel who has represented defendant under appointment of the court below, it is contended that the case must be reversed on account of this change in the law with regard to the punishment of the crime, and several provisions of our Penal Code are invoked in support of the position. As the question is one which has elicited some discussion amongst the legal profession of the State, we propose to meet and settle it in this the first case in which it has been presented directly for adjudication.

We reproduce the articles of the Code relied upon, which are as follows:—

"Art. 15. When the penalty for an offence is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every case the offender shall be tried under the law in force when the offence was committed, and, if convicted, punished under that law; except that, when by the provisions of the second law the punishment of the offence is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offence was committed." Rev. Stats., Penal Code, art. 15.

"Art. 17. When by the provisions of a repealing statute

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a new penalty is substituted for an offence punishable under the act repealed, such repealing statute shall not exempt from punishment a person who has offended against the repealed law while it was in force, but in such case the rule prescribed in art. 15 shall govern."

"Art. 19. No offence committed, and no fine, forfeiture, or penalty incurred under existing laws, previous to the time when this Code takes effect, shall be affected by the repeal herein of any such existing laws; but the punishment of such offence, and the recovery of such fines and forfeitures, shall take place as if the laws repealed had still remained in force; except that when any penalty, forfeiture, or punishment shall have been mitigated by the provisions of this Code, such provision shall apply to and control any judgment to be pronounced after this Code shall take effect, for any offence committed before that time, unless the defendant elect to be punished under the provisions of the repealed law.

"Art. 20. No penalty affixed to an offence by one law shall be considered as cumulative of penalties prescribed under a former law, and in every case where a new penalty is prescribed for an offence, the penalty of the first law shall be considered as repealed, unless the contrary be expressly provided in the law last enacted."

Upon comparison, it will be found that the foregoing articles are literal copies from former existing statutes. Pasc. Dig., arts. 1616, 1618, 1620, 1621.

The position assumed is that the change in the law affixing an alternative punishment or penalty for murder in the first degree was intended as a complete substitute for, and operates as an implied repeal of, the former law which limited the penalty to death; that if the statute which affixed the penalty is repealed, then no further proceeding can be taken under the repealed law to enforce the punishment after the repealing law takes effect; that this principle applies as well to the proceeding upon appeal in the Court

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of Appeals as to the court having original cognizance of the offence, and this too in cases where the repealing statute took effect pending the appeal in this court. In support of these propositions we are cited to the doctrine enunciated in *Wall v. The State*, 18 Texas, 682; *Murray v. The State*, 1 Texas Ct. App. 418, and *Sheppard v. The State*, 1 Texas Ct. App. 522. The same question was also discussed in *Dawson v. The State*, 33 Texas, 491. As applicable to the facts and circumstances of the respective cases cited, the principles enunciated in the three first mentioned will not be controverted or denied. Appellant's counsel combats the conclusion reached in *Dawson v. The State*, and therefore it is unnecessary to discuss that particular case.

We are of opinion that the question here raised, if necessary to be settled on precedent authority, must be investigated in the light of elementary principles, and adjudicated upon well-established and fundamental rules of statutory construction. To begin with, it is a fundamental rule that repeals by implications are not favored in law. *Thouvenin v. Rodríguez*, 24 Texas, 468; *Napier v. Hodges*, 31 Texas, 287. To constitute the repeal of a statute by implication, the new statute must cover the whole subject-matter of the old one, and prescribe different penalties. There must be an irreconcilable repugnancy between the two acts, and the repugnancy must be plain and unavoidable. *Cain v. The State*, 20 Texas, 370; Kent's Comm. 466, note *b*; 37 Ind. 111, 284. Admit, for the sake of argument, that the provision of the new Code comes up, as insisted, to the full measure of this standard; there is still another rule which lies at the very foundation, and which is the corner-stone, if we may so term it, of statutory construction, and that is that in interpreting a law the main object to be arrived at is the intention of the law-making power, and the interpretation to be given to the language used to express the intention should be such as to make the provisions of the statute consistent with reason. Bac. Abr., title "Statute," 238.

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“The object, and the only object, of judicial investigation in regard to the construction of doubtful provisions of statute law *is to ascertain the intention of the Legislature which framed the statute.*” Sedgw. on Stat. & Const. Law, 231. “Every interpretation that leads to an absurdity ought to be rejected.” *Kottwitz v. Alexander*, 34 Texas, 691; Vattel’s Rules, Potter’s Dwar. on Stat. 128. “Every legislative act must have a reasonable construction.” Am. Rules, Potter’s Dwar. on Stat. 154. “An act is not repealed by implication where the Legislature had no intention to repeal it.” *Tyson v. Postlethwaite*, 13 Ill. 727.

We are of opinion that it would be inconsistent with reason to hold that the Legislature could have intended, in changing the penalty for murder in the first degree by the adoption of the Revised Statutes, that the statute changing it should repeal the preëxisting law, and have such an effect as to operate upon cases already tried, and pending on appeal.

This position is further strengthened by reference to other rules of statutory construction, to the following effect, viz.: “A thing within the *intention* is within the statute, though not within the letter; and a thing within the letter is not within the statute unless within the intention.” Potter’s Dwar. on Stat. 144 (8). “The real intention, when accurately ascertained, will always prevail over the literal sense of the terms.” 1 Kent’s Comm., side-p. 462; *Brooks v. Hicks*, 20 Texas, 666. “It is a rule of construction generally to be adhered to in the construction of constitutions as well as statutes that they operate prospectively, unless the words employed or when the object in view and the nature and character of the provision clearly show that it intended a retrospective operation.” *Orr v. Rhine*, 45 Texas, 345 (citing 10 Ohio (N. S.) 588; 3 Ind. 258; 2 Kans. 432, 41 Mo. 453).

In *Lyon v. Fisk*, where a question analogous to the one we are considering came up for decision in the Supreme

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Court of Louisiana, it was said: "Where the revision and formation into a code of the laws and jurisprudence of a country is effected, without a clause of repeal, as was the case with the Code of 1808, we hold the rule of interpretation to be, as in cases of successive statutes, that the law does not favor a repeal by implication unless the repugnance be quite plain; that the Code must be confined to repealing as little as possible of the preceding laws; that although a disposition of the Code may seem repugnant to some of those laws, that disposition must, if possible, have such construction that it may not be a repeal of those laws by implication." 1 La. An. 444.

And in *Wright v. Oakley* the language of Chief Justice Shaw is: "In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the Legislature. *In terms*, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by the revision. There was no moment when the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a *continuance* and modification of old laws than as an abrogation of those old and the reënactment of new ones. In order to construe them correctly, we must take the whole of the revised statutes, together with the act of amendment and the repealing act, and consider them in reference to the *known purposes* which the Legislature had in view in making the revision." 5 Metc. 406; *The State v. Brewer*, 22 La. An. 273.

Again, statutes in *pari materia* and relating to the same subject are to be taken and construed together, because it is to be inferred that they had one object in view, and were

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intended to be considered as constituting one entire and harmonious system. *Taylor v. The State*, 4 Texas Ct. App. 169; *Napier v. Hodges*, 31 Texas, 287; 1 Pasc. Dig. Dec. 637, and authorities cited.

In *Smith v. The People*, the Court of Appeals of New York declare that "a statute should not be so construed as to work a public mischief, unless required by words of the most explicit and unequivocal import. (Citing *The People v. Lambier*, 5 Denio, 9.) In the construction of statutes, effect must be given to the intent of the Legislature whenever it can be discerned, though such construction seem contrary to the letter of the statute. That intent must be primarily sought in the language of the statute, and if the words employed have a well-understood meaning, are of themselves precise and unambiguous, in most cases no more can be necessary than to expound them in their natural and ordinary sense. The words in such case ordinarily best declare the intention of the Legislature. 11 Cl. & Fin. 86; 3 Seld. 97; 1 Kern. 593. These rules are elementary, but it is equally well settled that words absolute of themselves, and language the most broad and comprehensive, may be qualified and restricted by reference to other parts of the same statute in which they are used, and to the circumstances and facts existing at the time and to which they relate or are applied. * * * If, in reading a statute in connection with other statutes passed at or about the same time, a doubt exists as to the force and effect the Legislature intended to give to particular terms, — that is, as to the meaning which it was intended they should bear and have in the connection in which they are used, — it is also competent to refer to the circumstances under which, and the purposes for which, a statute is passed, to ascertain the intent of the Legislature. The ground and cause of the making of a statute explains the intent. Com. Dig. 11. * * * Again, statutes enacted at the same session of the Legislature should receive a construction,

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if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in *pari materia*." 47 N. Y. 330.

And in *Austin v. G. C. & S. F. Railroad Company*, it was held by our Supreme Court that "laws relating to the same subject, enacted during the same session of the Legislature, are to be construed together, and are ordinarily to be taken as parts of the same act." 45 Texas, 234.

Now, in applying these principles to the question as raised in the case under consideration, we find the circumstances attending the adoption of our Revised Statutes were these: The act adopting the Penal Code and Code of Criminal Procedure was presented to the governor for approval on the 27th and the act adopting the Civil Statutes on the 28th of February, 1876, and both became a law without his signature on the seventeenth day of March, 1879; the former to take effect the 24th of July, 1879, and the Civil Statutes to become operative the first day of September, 1879. In point of fact, the last legislation with reference to the Revised Statutes was the adoption of the "Final Title," "General Provisions," p. 718, which is intended, as far as practicable, to apply as well to the Codes as to the Civil Statutes. If not satisfactorily settled by the principles of law above enunciated, we hold that the question under discussion is settled by the positive provisions of the sixth section of the "Final Title," which reads as follows: "That no offence committed, and no liability, penalty, or forfeiture, either civil or criminal, incurred, prior to the time when any statute, or part thereof, shall be repealed or altered by the Revised Statutes, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offences, liabilities, penalties, or forfeitures shall be instituted and proceeded with in all respects as if such prior statute, or part thereof, had not been repealed or altered, except that when the mode of procedure or matters of practice have been changed by the Revised Statutes, the

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procedure had after the Revised Statutes shall have taken effect, in such prosecution or suit, shall be, as far as practicable, in accordance with the Revised Statutes." Rev. Stats. 718.

Having disposed of this question, we will proceed to consider the matters growing out of the conduct of the trial on the merits, which are complained of as error.

1. A very interesting subject is earnestly argued by counsel in his brief, which is not presented in a manner authorizing that we should consider it. We allude to the admission of the confessions of the defendant in evidence. It is urged that counsel was taken by *surprise* with regard to this confession, because of the fact that the same witness who upon this trial testified that, before the confession, the justice of the peace had cautioned defendant that the confession might be used against him (Pasc. Dig., art. 3127), had testified at the former trial and proved no such fact. And in support of his right to a reversal upon this ground, we are cited to the case of *Boxley v. The Commonwealth*, 24 Gratt. 649, and 1 Hawley's Am. Cr. Rep. 655, wherein it was held that, "if the testimony of the principal witness for the prosecution on the trial varies materially from that given by the same witness before the committing justice, who is unexpectedly absent from the trial, the prisoner is entitled to a new trial on the ground of surprise." Such is not the rule of practice in this State. "Surprise" is not one of the grounds for new trial in felony cases, all of which grounds are prescribed by our statute. Pasc. Dig., art. 3137; Rev. Stats., Code 'Cr. Proc., art. 777. With us, "a continuance may be granted on the application of the State or defendant, after the trial has commenced, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had; or the trial may be postponed to

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a subsequent day of the term." Pasc. Dig., art. 2193; Rev. Stats., Code Cr. Proc., art. 568. To have availed himself of the surprise, the defendant should have applied for a continuance, or have asked a postponement of the case, to enable him to properly controvert or meet the matter which operated the surprise. *Higginbotham v. The State*, 3 Texas Ct. App. 447.

No objection was raised on the trial to the admission in evidence of the defendant's confessions, and defendant cannot now be heard to complain that they were illegal and inadmissible. There might have been much force in the argument of counsel had these confessions been admitted over objection, and the question properly presented for revision. "Although no unbending, universal rule can be laid down by which to determine whether subsequent confessions in a criminal case are admissible when the former confessions were obtained by improper influences, yet in each case the inquiry must be whether, considering the degree of intelligence of the prisoner, and all the attendant circumstances, it is affirmatively shown that the effect of the primary improper inducement was so entirely obliterated from his mind that the subsequent confession could not have been in the slightest degree influenced by it; and if there be any doubt on this question, it must be resolved in favor of the prisoner, and the confession must be excluded." *Porter v. The State*, 50 Ala. 95; 1 Greenl. on Ev., sect. 221; *Barnes v. The State*, 36 Texas, 363. But, as stated above, no objection was made and no bill of exceptions saved to the introduction of this evidence. "As far as can be seen from the record, the evidence to which objection is now made went to the jury without objection. That this cannot be done for the first time in this court has become long since too well settled to be the subject of comment, or to require the reference to authority in its support. No reason is assigned, and none is seen, why evidence of the particular character now in question should furnish an exception to the

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rule.” *Johnson v. The State*, 27 Texas, 758; *Brown v. The State*, 2 Texas Ct. App. 115; *Poe and Robinson v. The State*, 32 Texas, 65; *Smith v. The State*, 1 Texas Ct. App. 133; *Owens v. The State*, 4 Texas Ct. App. 153; *Pasc. Dig.*, art. 3068; *Rev. Stats.*, art. 686.

The question as to whether this confession was freely and voluntarily made was, it seems, twice passed upon in the trial: first by the judge, when he admitted it in evidence, and then again by the jury under the following charge from the court: “In regard to the evidence of the confession of the defendant, you are charged that you will consider such evidence if you find that one was freely and voluntarily made by defendant after he had first been cautioned that such confession might be used against him; but if you believe that defendant made a confession but it is not shown to have been freely and voluntarily made, or if it is shown by the evidence to have been made upon compulsion or persuasion, you will reject it from your consideration in making up your verdict.” Whether it was a question alone for the judge or alone for the jury to pass upon, it is unnecessary to decide, since it seems to have been passed upon by both. *Hauck v. The State*, 1 Texas Ct. App. 357; *Estrado v. The People*, 49 Cal. 171.

There is but a single bill of exceptions exhibited in the record, and this was saved to the admission in evidence of proof with regard to foot-tracks made by defendant in Justice Joiner’s office whilst he was under arrest. Just after the discovery of Maj. Munroe’s murder, some parties present commenced examining for any signs or evidence left by the perpetrator at the house and around the premises. Footprints were found in the house, at a window, and in the peach-orchard, which were measured by the witnesses, one of whom was George Grimes. The portion of his testimony which was objected to on the trial was as follows: “I saw the same measure applied to a track in Judge Joiner’s office at Bremond. Joiner made the defendant

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make his track in the ashes and sand in his office, where a stove had been. The impression made was plain, and it was about the same as tracks made in Munroe's house. The measure was applied to the footprints in Joiner's office, and it was the same in every particular, — fitted it exactly."

It is contended that the evidence was incompetent and inadmissible, because it was evidence which defendant was compelled to make and give against himself, in contravention of the tenth section of the Bill of Rights, art. 1 of the Constitution, which declares that one accused of crime shall not be compelled to give evidence against himself.

This identical question was presented in the case of *The State v. Graham*, 74 N. C. 646. Rodman, J., delivering the opinion of the court, says: "The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track found in the cornfield. This resemblance was a fact calculated to aid the jury, and fit for their consideration." After citing Best on Evidence, sect. 183, and other authorities, the learned judge proceeds to say further: "If an officer who arrests one charged with an offence has no right to make the prisoner show the contents of his pocket, how could the broken knife or the fragment of paper corresponding with the wadding have been found? If, when a prisoner is arrested for passing counterfeit money, the contents of his pockets are secured from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of *scienter*? If an officer sees a pistol projecting from the

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pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or a mask over his face, may not the court order its removal in order that the witness may say whether he was the person whom he saw commit the crime?" * * * The conclusion reached is thus summoned up: "We agree in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to have put his foot in the tracks, if he had persisted in not doing so." See this case of *The State v. Graham, supra*, also reported in full in 1 Am. Cr. Rep. (Hawley) 182.

The question here is essentially different from the one before the Supreme Court of Tennessee in *Jerry Stokes v. The State* (March 11, 1876), cited by counsel, where a pan of soft mud was brought into the court-room on the trial, and the prisoner was asked in the presence of the jury to put his foot into it, which he declined to do. The reversal in that case was upon the ground that the prisoner was asked in the presence of the jury to make evidence against himself, and because, the court say, they "are satisfied the jury were improperly influenced thereby. * * * The bringing in of the pan of mud and the request of the attorney-general was improper, and should not have been permitted by the court." *Stokes v. The State* is also reported in 2 Texas L. J. 243.

We have examined this case with great care, and have endeavored to meet all the points made by the able counsel who has without fee followed the cause of his client through two trials in the lower and two appeals in this court. He

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has made a most urgent appeal to us upon the law and the facts in the case. We cannot concur with him in his belief that any such error has been committed on the trial as requires that the judgment should be reversed. Defendant has had a fair and impartial trial, so far as this record discloses, and in which his rights have been fully guarded and protected. That he is guilty of the crime of murder, a horrible murder by assassination, prompted to the deed by his lust for the few paltry dollars in the possession of the murdered old man, the court and jury below did not doubt, and we do not doubt, if the record before us, as we presume, speaks the truth of the matter; that he has justly forfeited his life by his crime we are equally as well satisfied, and the judgment is therefore affirmed.

Affirmed.

JOHN CURRY v. THE STATE.

THEFT OF CATTLE. — Note evidence held to be too indeterminate and inconclusive to identify the accused as the person by whom the theft of a cow was perpetrated.

APPEAL from the District Court of Titus. Tried below before the Hon. B. T. ESTES.

The material facts are recapitulated in the opinion.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. From the evidence contained in the statement of facts before us, it appears that sometime in August, 1879, John Morris, the owner of the cow alleged to have been stolen by the appellant, missed his cow from the range, and, hearing that appellant had been killing beeves, went to the farm upon which appellant lived as a renter,

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with other tenants, and found spread out upon the roof of a stable in the horse-lot upon the premises, the hide of an animal, which he identified as having been taken from his cow. The tail and ears had been cut off, and the hide was spread with its flesh side up, in plain view of the house and road. The animal appears not to have been branded.

In company with others, the owner, Morris, went again upon the premises, on the succeeding day, and found, about three hundred and fifty yards from appellant's house, the head of an animal freshly skinned, which was identified also as belonging to his cow. There seems to have been but one horse-lot upon the farm, which was used by all the tenants, and that the house in which appellant lived was nearer to the horse-lot than the houses of the others. Being arrested for the crime by the party, appellant became much excited, and on the way to the county jail attempted to make his escape. The party making the arrest consisted of eleven men, including Morris, the owner of the cow; and the arrest was made without warrant.

These are the main features of the evidence; and viewing them from the most favorable stand-point for the prosecution, we cannot say they are sufficient to authorize us to allow the verdict to stand and become a precedent. There is an entire absence of any evidence pertinently identifying the defendant with the transaction constituting the offence charged against him. The indiscriminate use of the horse-lot by others as well as the defendant renders it as probable that some one else may have placed the hide upon the stable as that it was done by the defendant, and the discovery of the head of the animal at the back of the field of the farm, in a thicket, standing alone or in connection with other testimony, fails to point with more significance to the defendant as the guilty party than to other residents upon said farm. The agitation of the defendant, and his attempted escape while being conveyed to jail, may, in the absence of testimony more clearly pointing to his guilt, be

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attributed to some motive other than a consciousness of guilt and an apprehension of legal punishment.

Other evidence is probably accessible to the prosecution by which the guilty party may be identified; and, to the end that a fuller investigation may be had, the judgment is reversed and the cause remanded.

Reversed and remanded.

G. W. MARNOCH v. THE STATE.

1. **SEAL OF COURT.** — Defendant objected to being forced to trial, on the ground that the seal on his copy of the *venire facias* bore the legend "District Court, Bexar County," instead of "District Court of Bexar County," as directed by law. *Held*, that the objection was properly overruled, the seal being in substantial compliance with law.
2. **PRACTICE** — The district attorney being disqualified in this particular case to represent the State, the court below, at a former term, appointed an attorney to conduct the prosecution in his stead, and at that term the appointed attorney qualified and acted; but at the ensuing term the same attorney was allowed by the court to represent the State in the case without a reappointment or new qualification, and prosecuted the case to conviction. *Held*, no error is apparent of which the appellant can complain.
3. **MURDER — EVIDENCE.** — In a trial for murder, the circumstances of a previous difficulty between the defendant and the deceased are competent evidence for the State in order to show the *animus* of the homicide, and may, as in the present case, be competent for the defendant as explanatory of his acts.
4. **SEPARATION OR MISCONDUCT OF JURORS.** — Note the admonition and strictures on this subject in the opinion.
5. **SELF-DEFENCE — CHARGE OF THE COURT.** — An instruction on the right of self-defence is objectionable, and may, as in the present case, be material error, if it limits the right of self-defence to actual danger. See the facts in illustration.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. NOONAN.

At the April term, 1878, of the District Court of Bexar County, the appellant was indicted for the murder of Charles

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Mueller, on the 18th of March, 1878, by shooting him with a gun. At the April term, 1879, a trial was had, and he was found guilty of murder in the second degree. His punishment was assessed and adjudged at twenty years' confinement in the penitentiary.

The material evidence in the case, as well as other facts of interest, will be found in the opinion.

Harrison & Edmonds, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Without confining ourselves to the order observed in the assignment of errors, or in the brief of counsel for the appellant as to the supposed errors, we will only notice one or two which seem to be mainly relied upon, before approaching the principal question upon which the determination of the case depends.

Exceptions were raised to the copy of the special *venire* served upon defendant, because the same was not "certified by the clerk under the seal of the District Court of Bexar County." This objection was settled in the case of *Cordova v. The State*, 6 Texas Ct. App. 208, which was also an appeal from the District Court of Bexar County.

It is contended that there was error in permitting M. G. Anderson, Esq., to represent the State on the trial. At a former term the county attorney had recused himself because disqualified in this particular case. M. G. Anderson was appointed in his stead, and qualified and acted at that former term. It is now maintained that without a reappointment and qualification he could not lawfully act at any subsequent term; and it is claimed further that the act of August 7, 1876, p. 87, sect. 12, is conclusive of the question. This section, which we copy from the Revised Statutes, Code Criminal Procedure, art. 39, is as follows: "Whenever any district or county attorney shall fail to attend any term of the District, County, or

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Justice's Court, the judge of said court, or such justice, may appoint some competent attorney to perform the duties of such district or county attorney, who shall be allowed the same compensation for his services as are allowed the district or county attorney. Said appointment shall not extend beyond the term of the court at which it is made, and shall be vacated upon the appearance of the district or county attorney." Similar authority was conferred, with a similar proviso, upon District Courts under the act of 1846, in cases of failure to qualify by the elected district attorney. Pasc. Dig., art. 191.

The statute quoted evidently contemplates an appointment *in the absence* of the district or county attorney, and where the *pro tempore* appointee will represent the absentee generally in all the duties incident to his office. But here the county attorney was not absent, nor was M. G. Anderson appointed to represent him generally, but, so far as we are informed, in this particular case only. There is no question raised as to the legality of the appointment for the former term. How or why, since the appointment extended to but the single case, and because of disqualification in the case of the county attorney, it was or should be necessary that the court should renew the appointment, and the same appointee go through the form of qualifying anew at every subsequent term as long as the case was pending, is a position the force or reason of which we cannot appreciate. As long as the necessity exists, no reason is perceived why the original appointee should not attend the case to its final termination; and certainly, in the absence of any good reason why he should and could not act, and in view of the fact that the court which appointed him recognized his action at the subsequent term, we do not think that defendant can be heard to complain. *Eppes v. The State*, 10 Texas, 474; *The State v. Gonzales*, 26 Texas, 197; *Bennett v. The State*, 27 Texas, 701; *The State v. Manlove*, 33 Texas, 798.

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It is unnecessary to consider the exceptions taken to the refusal of the court to permit certain questions to be asked for the purpose of getting in evidence the facts concerning a prior difficulty between the parties the day of the homicide, since it appears, and the fact is also stated by the judge in another bill of exceptions certified by him, that the witnesses did testify fully to every thing said and done by all the parties engaged in the former altercation. Under the peculiar facts connected with the homicide, what had transpired in the former difficulty was admissible both in behalf of the State and defendant: of the State, to show the *animus* of the accused; of the defendant, to explain the reasons of his return to the party with a loaded gun in his hands.

Complaint is made of a separation of one or two of the jurors from their fellows. Whilst this objection is fully and satisfactorily answered in this instance by the affidavits of the jurors, and of the officers having them in charge, the frequency with which complaints of this character occur induces us again to call attention to the law which prohibits the separation of the jury in a felony case, except by permission of the court, with consent of the parties, and in charge of an officer. Rev. Stats., Code Cr. Proc., art. 687. And any juror, and other person conversing with a juror upon any subject after he is empanelled in a felony case, except in presence of and by permission of the court, shall be punished for contempt of court, by fine not exceeding \$100. Rev. Stats., arts. 690, 691.. A violation of these rules is made one of the grounds for which a new trial shall be granted in felony cases. Rev. Stats., art. 777, subdiv. 7. Juries, and the officers having them in charge, should be admonished by the court in this regard, and the punishment imposed should be rigidly inflicted for every palpable violation of the law. Such questions should not be permitted to arise, and will not except in rare instances, and cannot often where jurors and officers are strictly conscientious in the discharge of their duties.

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In our opinion, the principal question in the case as presented by the record is the sufficiency of the charge of the court in its applicability to the facts of the case. Substantially stated, the facts are these: A dispute as to boundary of lands had arisen between some parties, and they had determined to settle it by a resurvey of their respective lines. How or in what manner defendant and deceased were interested is not made to appear. At all events, on the day appointed for the survey, the defendant, Charles Mueller (the deceased), John P. Mueller, and others, met at the dinner-table of one of their neighbors. The deceased told defendant that he (defendant) had been writing to the post-office department at Washington, charging him (deceased) with official misconduct as postmaster. Marnoch said he lied, or was a liar, or words to that effect. Deceased and his brother both used very abusive language towards defendant, and threatened to thrash him. No blows were passed. Charles Mueller (deceased) shook his fist in defendant's (Marnoch's) face. A short time afterwards the Muellers recommenced the quarrel, and wanted to fight defendant, but were prevented by the interference of others. Marnoch then left, saying, "I will go away, but I will come back again." The surveying party returned to their work, and whilst so engaged, about one and a half hours after Marnoch had left, he returned to where they were, having a double-barrelled gun in his hands. John P. Mueller, the brother of deceased, stepped up to him and said, "Did you bring that shotgun here to shoot me?" Marnoch replied, "No; I brought it here for protection or defence." The witness H. S. Baker says: "When the Muellers saw him coming with the gun, they became very much excited again, and wanted to take the gun away from defendant. One or both of them advanced towards him. Defendant said, 'I brought the gun for protection.' John P. Mueller had a hatchet in his hand, and both he and Charles made demonstrations against defendant as if to take

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the gun away from him. After the matter was quieted down, Marnoch came up to Navarro (the surveyor) and handed him something. Charles Mueller said something to him, and made a rush towards defendant with both hands extended (other witnesses say he had his left hand in his pocket), the right hand above his head, as if to seize the gun; there was nothing in his hands at the time. Defendant said, 'Stand back,' and fired almost instantaneously. * * * Deceased was only five or six steps from defendant when he started and rushed suddenly upon him. * * * Marnoch had the gun at his hip when he fired. The muzzle was pointing up." William Boerner, another witness, says: "The Muellers tried to make Marnoch put down the gun, and Charles Mueller said in German to his brother, 'You take him in front and I will take him from behind,' or words to that effect. * * * I was lying on the ground a few steps off when the shooting took place. Mueller advanced on Marnoch, and had to step over my legs in so doing. * * * Defendant said, 'Don't take my gun,' very hurriedly; at the same moment the gun fired. The right hand of Mueller was open and extended at the time of the killing." All the witnesses testified that either of the Muellers was stouter than the defendant. And all testified that when the deceased fell, he fell upon his face.

Upon the law of self-defence the court charged the jury as follows: "Homicide is permitted in the necessary defence of one's person; but the attack upon the person of an individual, in order to justify the homicide of the attacking party, must be such as to produce a reasonable expectation or fear of death, or some serious bodily injury. If you believe from the evidence that the defendant took the life of the deceased in order to save his own life, or to prevent a serious bodily injury at that very moment about to be inflicted upon him, you will acquit the defendant."

Amongst the several special charges asked for defendant and refused by the court we find the following: "If,

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therefore, the jury believe from the evidence that, at the time of the killing of the deceased, he (deceased) was in the act of making an unlawful and violent attack upon the defendant, such as was calculated to create in the mind of the defendant a reasonable apprehension of death or serious bodily harm, they must acquit the defendant." The court says the charges were refused because they were already given in the general charge.

We do not think the charge of the court covered the question submitted in the above special instruction, especially upon the question of reasonable apprehension and appearances of danger. The special instruction, whilst it was not as comprehensive as it should have been, was still sufficient to call the attention of the court to the necessity of a charge upon this branch of the case; and the court, under the facts above stated, should, in our opinion, have either given the charge as asked, or one more pertinently submitting the question to the jury. Under the charge as given, the jury were left to infer that the danger to the accused of death or serious bodily injury must have been actual and positive, in order to excuse the defendant for taking life. The language is, "took the life of the deceased to save his own life, or to prevent a serious bodily injury at that very moment about to be inflicted." Self-defence does not require any such positive proof of danger. See specially *Smith v. The State*, 52 Ga. 88; 1 Hawley's Am. Cr. Law Rep. 246.

"Men, when threatened with danger, must determine from appearances and the actual state of things around them as to the necessity of resorting to self-defence; and if they act from reasonable and honest convictions, they will not be held responsible criminally for a mistake in the extent of the actual danger, where other judicious men would have been alike mistaken. A contrary rule would make the law of self-defence a snare and a delusion. It would become but a mockery of the sacred right of self-preservation." *Campbell v. The People*, 16 Ill. 16. Our

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statute declares the same doctrine substantially. It declares that "the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death or some serious bodily injury." Pasc. Dig., art. 2230; *Horbach v. The State*, 43 Texas, 242; *Irwin v. The State*, 43 Texas, 236; *Blake v. The State*, 3 Texas Ct. App. 581; *May v. The State*, 6 Texas Ct. App. 191; *Plasters v. The State*, 1 Texas Ct. App. 673; *Agilone v. The State*, 41 Texas, 501; *Edwards v. The State*, 5 Texas Ct. App. 593; *Cheek v. The State*, 4 Texas Ct. App. 444; *Smith v. The State*, 52 Ga. 88; 1 Hawley's Am. Cr. Law Rep. 246.

Because the court erred in failing to give in charge to the jury the law applicable to the case, as we have shown above, the judgment must be reversed, and the cause remanded for a new trial.

Reversed and remanded.

C. REEVES v. THE STATE.

1. BURGLARY—INDICTMENT. — The intent being of the essence of the offence of burglary, and a fact which is to be proved by the State, it should be expressly alleged in an indictment for that offence.
2. HEARSAY EVIDENCE is none the less incompetent because no other or better evidence is possibly to be found or obtained.

APPEAL from the District Court of Rusk. Tried below before the Hon. A. J. BOOTY.

After laying time and venue, the indictment alleged that the defendant did, "between the hours of ten and twelve o'clock on the night of said day, forcibly enter the dwelling-house of one J. M. Barton, then and there situate, and, after the forcible entry of said dwelling-house as aforesaid, the said Columbus Reeves, *alias* Columbus Reel, did then

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and there fraudulently and feloniously take, steal, and carry away from and out of said house, and out of the possession of one Virgil Barton, sleeping therein, one coat, one vest, one pair of pants, and one shawl, the same being corporeal personal property of the value of thirty dollars, and the property of the said Virgil Barton, without his consent, and with the unlawful intent to deprive the owner of the value of the same, and to appropriate said coat, vest, pants, and shawl to the use and benefit of him," etc.

The opinion shows the other facts pertinent to the rulings.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK. J. The indictment in this case is for burglary, and fails to charge the breaking and entry to have been made with intent to commit a felony or the crime of theft; but, after alleging the entry, charges the perpetration of theft, in the language of the statute. At common law, and in some of the States, this mode of pleading has been held permissible. Whart. Cr. Law, sect. 1613; 2 Bishop's Cr. Law, sect. 115; 2 Bishop's Cr. Proc., sect. 148; 2 Archb. Cr. Pr. 329, 332; *The Commonwealth v. Brown*, 3 Rawle, 207; *Jones v. The State*, 11 N. H. 269; *The State v. Bartlett*, 55 Me. 200. It is noticeable, however, that some of these authorities sustain the rule with reluctance, and hold that the practice of drawing indictments in this form is not to be commended; while the courts of other States hold adversely to the sufficiency of such indictments. *The State v. Eaton*, 3 Harr. (Del) 554; *The State v. Lockhart*, 24 Ga. 420.

No case has been found in the reports of our own State in which this exact point has been presented and adjudicated, and we feel authorized, therefore, to establish that rule

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which commends itself to us as best supported upon principle.

The intent in burglary is of the essence of the offence, and must be proved like any other substantive fact; not, indeed, by express and positive testimony, but by the best evidence of which the case is susceptible. Proof of the intent being essential, the rules of good pleading would seem to require that it should be alleged, not inferentially, but by direct averment, in order that the offence, in all its substantive parts, may be set forth in plain and intelligible words; and such seems to be required by statute. Pasc. Dig., art. 2866. Our statute is positive in requiring every thing to be stated in an indictment which it is necessary to prove (Rev. Code Cr. Proc., art. 421), which is believed to be an enunciation of the law as it existed before. The facts constituting the offence ought to be stated with such certainty as to apprise the accused of the particular charge which is preferred against him, in order that he may come prepared to answer the accusation. *Lewellen v. The State*, 18 Texas, 538. Without an allegation of intent, the charge in the indictment in this case is susceptible of construction as a charge for theft alone, committed under circumstances tending to indicate that the theft was perpetrated after a forcible entry into a dwelling-house in the night-time; and there is a failure to aver, except by inference, that such entrance was without the consent of the owner. It is not even alleged that the entry was felonious or burglarious, or even unlawful. To sanction such looseness in criminal pleading would be a departure from plainly established principle, and in violation of express statutory provision. The exceptions to the indictment should have been sustained.

On the trial of the case the witness Virgil Barton was permitted to testify, over the objection of defendant's counsel, that on the night the burglary was perpetrated in the house of his father, J. M. Barton, this witness was sleeping there,

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and, hearing a noise, he ran to an open window, in which his father was sitting, and asked what was the matter; to which his father replied that he had seen some one in the window, and, upon being further interrogated by the witness, stated that it was the defendant. Witness saw no one, although the night was not dark. Apart from the fact that certain portions of the stolen property were traced to the possession of the defendant, this was the only testimony tending to connect him with the offence.

It is inferred from the record that this evidence was admitted because J. M. Barton was very ill and could not attend court; but we know of no authority which sanctions the ruling, or which authorizes the admission of such testimony under any of the exceptions to the admissibility of hearsay or second-hand evidence. The statement of J. M. Barton to the witness was after the offence was committed, and could not be held as a part of the *res gestæ*, being a narrative of an occurrence already past. The rule excluding hearsay evidence applies with full force notwithstanding no better evidence is to be found, and though it be certain, if the account is rejected, that no other can possibly be obtained. 1 Ph. on Ev. 214.

Because of error of the court in overruling defendant's exceptions to the indictment, and in admitting the testimony of the witness complained of, the judgment is reversed and the cause remanded.

Reversed and remanded.

E. C. PEARSON v. THE STATE.

1. **BAIL-BONDS IN TRANSFERRED CASES.**—Bail-bonds and like obligations bind their makers for the appearance of the principal obligor, not only in the court designated therein, but in any other court to which his case may be transferred by operation of law; and the makers must take notice of constitutional and statutory provisions authorizing and regulating such

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transfers. Sureties, therefore, on a bail-bond made in 1875, and conditioned for the appearance of their principal in a District Court to answer a charge of misdemeanor, are liable for his failure to appear in the County Court to which his case was transferred under the provisions of the Constitution of 1876, and of the laws passed in pursuance thereof.

2. *SCIRE FACIAS* should state every thing necessary in a petition as well as a citation. It should recite the presentment of the indictment, the offence charged, the issuance of the *capias*, the arrest of the principal by virtue thereof, the execution, stipulations, and condition of the bond or recognizance, the breach of the condition, and the entry of the judgment *nisi*; and it should command the officer to cite the defendants to appear before the proper court, at the proper time, to show cause why the judgment *nisi* should not be made final.
8. *TRANSCRIPTS* on appeals from County Courts in cases transferred thereto from District Courts should contain the orders of transfer, properly authenticated.

APPEAL from the County Court of Brazos. Tried below before the Hon. D. C. BARMORE, County Judge.

The bail-bond was dated November 3, 1875, and was conditioned for the appearance of the principal obligor before the District Court of Brazos County on the 8th of November, 1875, to answer an indictment for adultery. The forfeiture was taken, and the judgment *nisi* entered at the August term, 1876, of the County Court of Brazos County; to which, under the provisions of the Constitution and acts of 1876, the case was transferable.

The appellant was a surety on the bond.

J. D. Thomas, for the appellant. In this cause there is judgment for \$200, for forfeiture of bail-bond. The surety appeals. The bond binds the principal to appear before the District Court of Brazos County, on the 8th of November, 1875, and "there remain from day to day and from term to term of said court, until discharged by course of law." On the 16th of August, 1876, a forfeiture was taken on this bond in the County Court of Brazos County, for failure of the defendant to appear on that day in that court.

I say the sureties are held liable only on the terms of

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their contract contained in their bond. They cannot be held for failure of their principal to appear before a court not named in the bond, and at a time when the court which is named was not in session. The act directing the transfer of cases from the District to the County Court makes no provision for bonds taken in the one court to be forfeited in the other. Acts 1876, p. 125.

It seems clear to me that the only means of enforcing the appearance of a party in the County Court is to have him arrested and bonded to appear in that court. If the Legislature or the Constitutional Convention had undertaken to hold sureties liable for the performance of a different duty from that undertaken in their bond, their action would have been entirely nugatory, as violative of the clause of the Constitution of the United States which inhibits the States from making any law impairing the obligation of contracts. And it would further be violative of the general principle that the law cannot make a contract for a citizen, or deprive him of any right he has under a contract, without his consent. Cooley's Const. Lim. 381, and note.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. It is contended that, as the indictment against the principal of appellant was presented anterior to the adoption of our present Constitution, and as the bail-bond was conditioned for the appearance of the defendant before the District Court of Brazos County, a forfeiture for non-appearance before the County Court, after a proper transfer to the latter court under the present Constitution and laws, was invalid for the reason that the contract was not for the appearance before that court. Undertakings of this character are entered into with no stipulation, express or implied, that the State shall not change the forum for the trial of the principal, and the undertaking is tantamount to an agreement that the principal shall appear

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either in the court designated or some other tribunal to which it may be transferred by law, and in which the principal may be tried for the offence with which he stands charged. The provisions of the Constitution, and general laws passed in pursuance thereof, authorizing and regulating the transfer of misdemeanors to the County and Justices' Courts, required the parties to the bond to take notice of their operation and effect, and they cannot be heard to complain that the case of their principal was transferred to the only court having jurisdiction of the offence.

The bond and judgments *nisi* and final seem to be in proper form, but the *scire facias* is fatally defective in not stating such facts as would have justified the rendition of a final judgment upon default of an answer. It should state enough to answer the purpose of a petition and a writ of citation also. It should recite with particularity the presentment of the indictment and the offence charged, the issuance of the *capias*, the arrest of the principal by virtue thereof, the execution of the bond and its condition, the breach of the condition, and the entry of the judgment *nisi*; and should command the officer to cite the defendants, in the usual terms, to appear at a specified time and before the proper court, to show cause why the judgment *nisi* should not be made final. *Brown v. The State*, 43 Texas, 349; *Cowen v. The State*, 3 Texas Ct. App. 380.

This transcript on appeal should also contain a copy of the order of transfer of the case from the District Court to the County Court, properly authenticated.

Because the *scire facias* issued in this case will not support the judgment, the judgment is reversed and the cause remanded.

Reversed and remanded.

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R. B. SIGLER v. THE STATE.

1. **THEFT—EVIDENCE.**—In a trial for theft of a horse, the proof showed that the accused had taken up and sold the animal openly, claiming it as his wife's. The State was allowed to prove by the purchaser that the animal was taken away from him by another witness (who testified that it was his property), and that the accused had never indemnified him for his loss. The accused offered proof that he had indemnified the purchaser; but, on objection by the State, the court excluded the evidence. *Held*, error. The proof made by the State was calculated to show a fraudulent intent on the part of the accused, and he was entitled to controvert it by other evidence if he could.
2. **PRACTICE.**—It is often necessary to refresh the memory of witnesses, and therefore the fact that a witness has already made a certain statement does not necessarily preclude further inquiry on the subject.

APPEAL from the District Court of Wise. Tried below before the Hon. J. A. CARROLL.

The opinion gives a clear statement of the case.

W. S. Herndon and Newton & Crane, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The appellant was indicted and convicted in the District Court of Wise County for the theft of a mare belonging to one James Burton. From the testimony on the trial, it appears that appellant, in the early part of the year 1878, was engaged in gathering horses belonging to his wife, who claimed to own certain brands, among them the "22" brand, having purchased said brands in the year 1869 from one N. W. Morris, who had married her step-daughter. This brand seems to have been recorded by Morris in the county of Wise, in the year 1861. Burton, the alleged owner of the animal stolen, and which bore this brand, testifies that he recorded this brand in Wise County in 1872. There was evidence tending to show that appellant was not familiar with the stock business, and that he gathered horses in this brand openly, and traded the mare

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alleged to have been stolen; and afterwards, on being informed that Burton claimed the mare as his property, replied that "he would see Mr. Burton and make the matter all right; that he did not want any of Burton's horses, and did not want Burton to have any of his."

The mare was traded by appellant to one Triplett for a saddle; and on the trial Triplett testified that Burton had claimed the mare and taken it from him, and that he had never received any thing for the saddle which he had let appellant have in exchange for the mare. He further testified that he had sued out a warrant for appellant's arrest, and had caused it to be placed in the hands of one Cates, his son-in-law, who went to Cooke County, where appellant resided, and arrested him; and that Cates got from appellant a black pony mare, and brought her back and gave her to witness in lieu of \$25 appellant owed witness on another and different horse-trade.

Defendant offered to prove by the testimony of his wife, Mrs. M. M. Sigler, that, when Cates came to their residence in Cooke County to make the arrest, the defendant gave to Cates, who represented himself as the agent of Triplett, a black pony mare in place of the one claimed by Burton, and a brown horse in place of the one traded to Triplett and in place of the money due Triplett, as a final settlement of all differences between them; which testimony, upon objection by the State, was excluded by the court.

This action of the court we regard as error. The testimony adduced by the State, as above indicated, was calculated, in the absence of explanation or contradiction, to aid materially in fixing upon the defendant a fraudulent intent in the transaction, and he was entitled to have his version of the affair placed before the jury in order that they might determine, under proper instructions, the very truth, and thereby deduce from this and other facts in evidence his guilt or innocence of the crime charged. The State having been permitted to introduce its version of the transaction,

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it was incumbent upon the court to permit the defendant also to be heard by his witnesses. In no other manner could the jury intelligently consider and weigh the testimony with the other facts in evidence, and its exclusion was calculated to injure the rights of the defendant.

We are of opinion also that the court erred in not permitting the witness M. M. Sigler to state whether or not Thomas King had ever had charge of the stock purchased by her of Morris, and the character of instructions given him about keeping up the brands, if any were given. Notwithstanding this witness may have already testified that she had not kept up the brand, nor branded any stock in said brand since she bought it, yet it should not be forgotten that witnesses, especially female witnesses, do not usually speak with legal accuracy in making their statements upon the witness-stand, and that it is often necessary, in the course of an examination, to call the attention of the witness specially to some fact which may refresh his recollection and cause him to modify a previous statement made with the utmost honesty and sincerity, but susceptible, from its looseness, of a construction never intended by the witness. It may be that the question would have served to remind the witness of a fact she had forgotten altogether, or overlooked in the confusion sometimes incident to female witnesses upon the stand. An affirmative answer from her might have had no unimportant bearing upon the result of the trial. For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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J. J. SMITH *v.* THE STATE.

1. **RETAILING.** — Art. 423e of the former Penal Code, which prohibited the sale of liquor in quantities less than a quart and permitting it drunk upon the premises where sold, prescribed no penalty itself, but referred for the penalty to a preceding article, which was repealed in 1866, and the repealing act itself was subsequently repealed, and new legislation and penalties were adopted. *Held*, that said art. 423e, though not repealed, became inoperative for want of a penalty, and a conviction for its violation in 1877 is set aside and the case dismissed. Note that the Revised Penal Code effectually provides for the offence.
2. **PENALTY** for an offence must be prescribed by the written law of this State, or none can be inflicted.

APPEAL from the County Court of Kaufman. Tried below before the Hon. H. P. TEAGUE.

J. S. Woods, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. It was held in *The State v. Perry*, 44 Texas, 100, and also in *The State v. Smith*, 35 Texas, 132, and in *May v. The State*, 35 Texas, 650, that art. 423e of the original Penal Code (Pasc. Dig., art. 2076) was not repealed by the subsequent act of October 27, 1866 (Laws 1866, chap. 70), nor by subsequent legislation, but remained in force, and that prosecutions could be sustained for a violation of its provisions. This article forbade the sale of liquor in quantities of a quart or more and permitting it to be drunk upon the premises where sold, and is the offence for which the appellant in this case has been indicted and convicted.

The case of *Perry*, above cited, was an appeal by the State, before the adoption of our present Constitution, from the judgment of the lower court setting aside an indictment; and it is presumed the attention of the court was not directed to the penalty, and how it should be ascertained, as that question seems not to have been raised. The article

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provides that those offending against its provisions should be punished as prescribed in the preceding article. The preceding article (423*d*) provided that any person, etc., who should sell liquor in quantities less than one quart, without having first obtained license therefor, should be punished by fine not less than \$50 nor more than \$250. Pasc. Dig., art. 2075. This last-named article was repealed by the above act of October 27, 1866, and this latter act was in turn repealed by the act of December 1, 1871. Laws 1871, 2d Sess., p. 52; *Countz v. The State*, 41 Texas, 50. It may be added that the act of December 1, 1871, was in turn repealed by the general tax-law of 1873 (Laws 1873, chap. 121), and by the act of March 13, 1875, which provided a penalty for pursuing any taxable occupation without paying the tax. Laws 1875, chap. 80.

Where, then, shall we look to ascertain and fix the penalty for a violation of art. 423*e* of the Penal Code? The article to which it originally referred for a penalty is repealed, and the repealing act is in turn repealed, and with each successive step in legislation new and different penalties are prescribed, until the passage of the act of 1873, when to pursue the occupation of a retailer without first obtaining a license ceases to be indictable altogether until 1875, when a general statute is passed applicable to all occupation-taxes, and prescribing a penalty not less than the amount of the tax nor more than double that sum.

The Code provides that no person shall be punished for any act or omission as a penal offence unless the same is expressly defined and the penalty affixed by the written law of this State. Penal Code, art. 3. The repeal of a law operates as an obliteration of the statute from the body of our laws, except as to rights vested. The repealed law cannot be appealed to as a part of the written law of the State, for after its repeal it does not constitute any part of that written law. Nor can we, under the statutory rule above cited, appeal to the common law or rules of con-

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struction to aid us. If the penalty is not affixed by the written law of this State, no punishment can be inflicted.

We are of opinion, therefore, that notwithstanding the statute upon which this prosecution is based was not repealed prior to the conviction of appellant, yet it is so defective, for the reason above stated, as to have no operation, and cannot support a conviction. Penal Code, arts. 6, 7.

We may add that this defect is entirely cured by the adoption of the Revised Penal Code, and the punishment for selling liquor in quantities of a quart or more and permitting the same to be drunk on the premises is now specifically prescribed by law. Rev. Penal Code, art. 377.

Because there was no law in force affixing a penalty to the offence charged against appellant, at the time the act was done, the judgment is reversed and the cause dismissed.

Reversed and dismissed.

EX PARTE L. ERWIN.

1. **HABEAS CORPUS—JURISDICTION AND PRACTICE OF THIS COURT.**—The mandates of this court in *habeas corpus* cases, whether original or on appeal, operate directly upon the officer or other person by whom the applicant is detained, and are not transmitted to inferior tribunals for enforcement, as in ordinary appeals. If, when the jurisdiction of this court is invoked, the applicant is not restrained of his liberty by any one, there is no case for the cognizance of this court and no respondent amenable to its process. It is not authorized, in an appeal from an order in chambers, to remand the case to the judge *a quo*, with directions. *Ex parte Coupland*, 26 Texas, 887, was an exceptional case, and was decided before it was provided by law that the escape of an appellant shall, in a criminal case, oust the jurisdiction of the appellate tribunal.
2. **SAME IN EXTRADITION CASES.**—*Quære*, whether a party detained by authority of an extradition warrant, and who has sued out *habeas corpus* before a district judge and been remanded to custody, has a right of appeal to this court. If so, however, he is not entitled to go at large, on bail or otherwise, pending his appeal. The right of bail guaranteed by the Bill of Rights does not obtain in extradition cases originating under that clause of

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the United States Constitution which requires the rendition of fugitives from justice.

B. BAIL IN HABEAS CORPUS CASES. — By art. 162 of the Revised Code of Criminal Procedure, a judge is empowered, pending a hearing on *habeas corpus*, to bail the prisoner from day to day; but this authority expires with the disposal of the case by the judge.

HABEAS CORPUS on appeal from an order in chambers of the Hon. S. FORD, Judge of the Ninth Judicial District.

A comprehensive and clear statement of the case will be found in the opinion. As will be there seen, the order below allowed bail to the appellant pending his appeal, and he availed himself of the privilege by executing bond to the satisfaction of the officer to whose custody he was remanded by the final order below.

The transcript was filed in this court at Tyler, on October 31, 1879. On the 18th of the next month the assistant attorney-general entered the following motion: —

“Now comes the State, by attorney, and represents to the court that this is an extradition matter, and that, on the hearing of *habeas corpus* before a district judge, respondent's special exceptions were sustained to the relator's pleadings, and the relator was remanded to the custody of the sheriff of Brazos County. It is further shown to the court that the district judge admitted the said relator to bail in the sum of \$1,000.

“The premises considered, the respondent moves the court to set aside the so-called bail or appeal bond, and, if necessary to the jurisdiction of this court, to order the issuance of a writ to bring the relator before this court in order to abide its judgment. Because, —

“1. The district judge had no authority to admit to bail a person not charged with an offence against the laws of Texas.

“2. Because the relator is constructively in the custody of the sheriff of Brazos County.

Argument for the State.

“ 3. In extradition matters, the relator is not entitled to bail in the State from which he is extradited.

“ 4. After the relator's pleadings were dismissed, the judge had no discretion as to the disposal of the relator, as he was then in custody by virtue of the warrant of extradition.

“ 5. All the orders made by the judge after he sustained the exceptions to the relator's pleadings and remanded him to custody were without authority of law, and absolutely void.

“ Respondent further moves the court to remand the relator to the custody of the sheriff of Travis County, Texas, to be by him held under the warrant of extradition, subject to the order of the agent of the State of Illinois.”

Thomas Ball, Assistant Attorney-General, in support of his motion. On the hearing of this cause before the district judge, respondent filed a plea to the jurisdiction of the court, which was overruled, and a bill of exceptions saved. In support of this plea, see Const. U. S., art. 3, sect. 2; art. 4, sect. 2; art. 6, sect. 1; Act of Congress, February 12, 1793; Hurd on Hab. Corp. (ed. 1858) 585, 586, 615, 616; *Ableman v. Booth*, 21 How. 523; *Martin v. Hunter's Lessee*, 1 Wheat. 324; *The Commonwealth of Kentucky v. Denison, Gov.*, 24 How. 95; *Spangler's Case*, 11 Mich. 299; *Hopson's Case*, 40 Barb. 34; *The State v. Buzine*, 4 Harr. 575.

In support of the respondent's exceptions to the relator's pleadings, on the ground that the court could not go behind the warrant of the governor of Texas, for any purpose, see Hurd on Hab. Corp. 585 *et seq.*; *The State v. Buzine*, 4 Harr. 575; *Manchester's Case*, 5 Cal. 237; *Davis's Case*, 122 Mass. 324; *Voorhees's Case*, 32 N. J. 142. That the bond is a nullity and the relator in custody, see Penal Code, art. 287, and the order of the judge remanding the relator to custody.

Argument for the appellant.

Davis & Beall, for the appellant. 1. Has a State court authority to entertain jurisdiction in a case of interstate extradition, or is it competent for a judge of this State to issue the writ of *habeas corpus* to inquire into the cause of the arrest and imprisonment of the relator, L. Erwin, who was arrested and detained under and by virtue of a warrant issued by the governor of Texas in obedience to the requisition of the governor of Illinois? We maintain, on behalf of the relator, that the courts of this State have jurisdiction of the case on *habeas corpus*, and we cite the following authorities: *Ex parte Thornton* 9 Texas, 641; *Hibler v. The State*, 43 Texas, 197. Reference is also made to the decisions of the courts of Michigan, Pennsylvania, New Jersey, New York, North Carolina, and Georgia, where the State courts assumed jurisdiction, and either remanded or discharged the prisoners as the law and facts seemed to justify. Hurd on Hab. Corp. 154, 159. The jurisdiction of the State courts is not exclusive, but concurrent. *Ex parte Joseph Smith*, 3 McLean, 127.

2. Is it competent for the court to go behind the warrant of the executive, and inquire into the sufficiency of the affidavit upon which the proceedings are predicated? It is submitted, on behalf of the relator, that while the court may not inquire into the guilt or innocence of the accused, yet the sufficiency and validity of the affidavit are proper subjects of judicial inquiry in order to determine whether a crime has been properly charged to authorize the extradition of a citizen of this State for trial in a foreign jurisdiction, in pursuance of the provisions of the United States statutes upon the subject. *Ex parte Thornton*, 9 Texas, 646; 5 Cal. 238; *The People v. Brady*, 56 N. Y. 185; 1 Park. Cr. 430; *Ex parte Smith*, 3 McLean, 127. In *Thornton's Case*, Chief Justice Hemphill held the warrant insufficient because not accompanied with a copy of the indictment, and discharged the prisoner. The affidavits in the California and New York cases were examined, held

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insufficient, and the prisoners discharged. In *Smith's Case*, 3 McLean, 121, considering the question whether the court hearing the writ of *habeas corpus* could go behind the governor's warrant and the return, Judge Pope said: "The court deems it unnecessary to decide that point, inasmuch as it thinks Smith entitled to his discharge for *defects in the affidavit*. * * * Again, the affidavit is *fatally defective* in this, that Boggs swears to his belief."

In *Heilborn's Case*, after stating that, to support the warrant, the complaint upon which it issued must be produced, the court say: "If, when produced, it shows its original invalidity, it must fall to the ground, and the warrant with it."

Judge Cooley, treating of this question, says: "Under the Constitution, the person who shall be surrendered must be charged with crime. This means that he must be charged in due course of law, in some proper judicial proceeding instituted in the State from which he is a fugitive. The charge is to be the foundation for the demand, and for the warrant of surrender; and it cannot be sufficient unless it contain all the legal requisites for the arrest of the accused, and his detention for trial, if he were then within the State." Princeton Rev. (Jan. 1879) 165; *Hartman's Case* (Sup. Ct. Ind.), 7 Reporter, 367.

CLARK, J. The right of appeal in cases of *habeas corpus*, in this State, is dependent upon and regulated solely by statute; and it is clearly contemplated by the law, which has received the sanction of repeated adjudications from this and other courts exercising supreme appellate power in such cases, that the orders of this court shall act directly upon the officers or other persons having the custody of the applicant, and not be transmitted through the medium of inferior tribunals, as in other cases of appeal.

Our Code of Criminal Procedure, among other provisions regulating such appeals, provides that the judgment which

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may be rendered by this court shall be certified by the clerk to the officer holding the defendant in custody, or, when he is held by any person other than an officer, to the sheriff of the proper county. Code Cr. Proc., art. 889. It further provides that if an officer holding a person in custody fails to obey the mandate of this court, he shall be deemed guilty of an offence; and if the applicant be detained by some person other than an officer, the sheriff, upon receipt of the mandate, shall cause his discharge. Code Cr. Proc., arts. 887, 888. If the applicant is ordered to give bail, the judgment of this court is certified to the officer holding him in custody, for his observance. Code Cr. Proc., art. 890.

From these provisions it appears unquestionable that the law contemplates, when this court is called upon to pronounce its judgment on an appeal in a *habeas corpus* proceeding, that the appellant must be in the custody of some officer or other person subject to its jurisdiction, and upon whom the process of the court can operate with directness. It was never contemplated that this court would act upon such an appeal when it had no authority to enforce its judgment, nor when the illegal restraint complained of had altogether ceased; nor is this court authorized to remand a case to an inferior judge with directions how to proceed in the enforcement of an original order made by him in chambers, and which may be left by the action of this court in full force and operation. If, pending an appeal, the restraint is removed, and the applicant has regained his liberty, no matter by what method, the proceedings here must terminate, and this court will not inquire into the legality of a detention which no longer exists. Such is the uniform practice. *Ex parte Peyton*, 2 Texas Ct. App. 296; *Ex parte Cohn and Hawes*, 2 Texas Ct. App. 380; *Dirks v. The State*, 33 Texas, 227.

It is true that in *Ex parte Coupland*, 26 Texas, 387, the Supreme Court retained jurisdiction of a similar appeal,

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notwithstanding it was made to appear that the applicant was possibly not in custody. But it is to be remarked that the showing to that effect was of a vague and indefinite character, and the court treated the question of dismissal of appeals after the escape of the appellant as one of practice simply, which rested in the sound discretion of the court. A different rule obtains now, and it must be regarded as jurisdictional. Code Cr. Proc., art. 845. Besides, the questions involved in that appeal were of a grave national character, affecting the great struggle in which we were then engaged, and demanding prompt adjudication by the authorities as a measure of public defence. It was the first case in which these questions had been brought to the attention of the court, and it could well say, as it did, that the public interest would be better subserved by hearing the appeal than by its continuance. No exigency of a similar character surrounds this case, and in the selection of a proper precedent we prefer to follow the later decisions of this court, based as they are upon the clear import of the statutes.

The applicant in this case applied to the Hon. Spencer Ford, judge of the Fourth Judicial District of this State, on the fourth day of July, 1879, for a writ of *habeas corpus* directed to Dennis Corwin, sheriff of Travis County, it being alleged that he was illegally restrained in his liberty by said Corwin, by virtue of a warrant from the governor of this State based upon a requisition of the governor of Illinois. The writ was made returnable before the district judge at Bryan on the seventeenth day of July, 1879; and after further postponement the matter was heard and determined on July 28th, and the applicant was remanded to the custody of the sheriff of Travis County to be delivered by him to the agent of the State of Illinois, to be transported to that State for trial. To this order the applicant excepted, and gave notice of appeal to this court; and thereupon, by a continuation of the same entry, the judge further ordered that the applicant be not remanded to the custody of the

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sheriff of Travis County, but to the custody of the sheriff of Brazos County, there to remain until this court should render its judgment on appeal. And it was further ordered, in the same judgment-entry, that the relator be admitted to bail upon sufficient sureties in the sum of \$1,000, conditioned as the law directs. A bond in that sum was executed on August 1, 1879, by appellant, with thirteen sureties, conditioned for the appearance of appellant before this court at the city of Austin, on the eighth day of April, 1880, there to abide such judgment as might be rendered.

Whether an appeal is permissible in this character of cases it is not necessary now to discuss, but we know of no provision of law which authorizes an applicant to prosecute appeal in the mode here attempted. Certainly if an appeal by a party arrested on a warrant of extradition is within the purview of the statute, the law makes no such exception in his favor as to authorize him to go at large pending the action of this court, and in a situation to defy its mandate and to treat its judgment with contempt. The analogies of the law cannot be appealed to in aid of the action of the judge below, for no such analogies exist. The charge against the applicant appears from the record to be a felony, and not a misdemeanor; and if a resort to analogy was permissible, and the judge was authorized to consider his order remanding the applicant as in the nature of a conviction, to follow a just analogy he should have been committed pending his appeal.

Nor can that provision in our Bill of Rights which provides that "all prisoners shall be bailable by sufficient sureties" be invoked to successfully sustain the action, because, as said by our Supreme Court, by the terms "all prisoners" it was not meant to require all prisoners under all circumstances to be bailed, but it must refer to a class of prisoners, each and all of whom shall be bailed except as therein provided. *Ex parte Ezell*, 40 Texas, 451. This provision in our organic law must be

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construed with and be controlled by that provision in the Constitution of the United States, which is the supreme law of the land, and which provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Const. U. S., art. 4, sect. 2. If upon arrest under a warrant of extradition bail is allowable, the Federal Constitution is set at naught, and delivery in the State having jurisdiction of the offence would have its price, regulated generally by the amount of the bail-bond, where one could be given at all, and a fundamental provision which was intended to apply to all classes of citizens would be restricted to the poor and unfortunate who were not able to furnish bail. Such cannot be the proper construction of the two constitutions. A new provision in our Code of Criminal Procedure authorizes a prisoner to be bailed from day to day pending a hearing on *habeas corpus*, in the discretion of the judge presiding at such hearing; but after a disposal of the case by him, this discretion no longer exists. Code Cr. Proc., art. 162.

This appeal is properly returnable to our Austin term, but, in the view we entertain of its nullity, it could subserve no useful purpose to continue it over for that length of time. The laws of the United States and of this State have already been delayed sufficiently in their execution by the applicant, who has failed to properly submit himself to their operation, but who seeks a judgment, standing sufficiently afar to evade its operation if it be adverse, and sufficiently near to avail himself of its protection if it be favorable. Standing outside the jurisdiction of this court, he cannot invoke its protection, nor can this court indulge any presumption in aid of one who is called upon to face his accusers under all the forms and sanctions of the law in a speedy public trial before an impartial jury, but who seeks

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assiduously to evade the issue and to avoid that jurisdiction which is alone competent to pronounce upon his guilt or innocence.

It is ordered by the court that this appeal be dismissed for want of jurisdiction; and it is further ordered that the clerk of this court transmit without delay to Dennis Corwin, sheriff of Travis County, a certified copy of the judgment of dismissal, for the information and guidance of that officer.

Ordered accordingly.

D. JOHNSON v. THE STATE.

1. CONTINUANCE. — A third continuance having been a matter for the discretion of the court below under the original Code (as all continuances now are by the Revised Code), and not a matter of right, this court declines to revise a refusal thereof.
2. SAME. — Evidence which, if adduced, would not tend to show facts inconsistent with the defendant's guilt is not of that materiality necessary to support an application for a continuance.

APPEAL from the District Court of Hunt. Tried below before the Hon. G. J. CLARK.

The rulings call for no detail of the evidence. Blake, of whom mention is made in the opinion, was the principal witness for the State. The punishment assessed and adjudged against the appellant, was confinement in the penitentiary for three years.

T. D. Montrose, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. The application for continuance was the third one made by defendant in this case, as is shown by explanation of the judge to the bill of exceptions reserved

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to the action of the court overruling it. The application being one addressed to the sound discretion of the court, and not being a matter of right, — as indeed no application now is, under the existing law (Rev. Stats., Code Cr. Proc., art. 560), — we do not feel called upon to revise the action; and especially since the facts proposed to be proved by the witness might all be true and yet not inconsistent with defendant's guilt. For Blake could have made the saws as detailed, a few days before he (Blake) was confined in jail, and might have made them for the purpose of conveying them into jail, and yet the same identical saws may have been conveyed into jail at the instance of Blake by defendant, in the soles of his (defendant's) boots, as was proved on the trial. The facts proposed to be proven would not, as stated in the affidavit, even if true, have excused defendant.

We have examined the record with care, and find no material error in it. The evidence was sufficient to warrant the verdict, under a charge which presented the law in a full and perspicuous manner, and one as favorable to defendant as he was entitled to by law. The judgment is therefore affirmed.

Affirmed.

JAMES ALLEN v. THE STATE.

1. AGGRAVATED ASSAULT — PENALTY. — The Revised Penal Code having ameliorated the penalty for aggravated assault, it was error, in a trial since it took effect, for an aggravated assault committed prior thereto, to give in charge to the jury the penalty prescribed by the original Code, unless the accused elected to receive that penalty.
2. FORMER CONVICTION before a Justice's Court for a simple assault constituted, under the old Code, no bar to a subsequent prosecution for aggravated assault, though both prosecutions were based on the same breach of the peace. And the Revised Code of Criminal Procedure explicitly provides for this character of defence in future. Art. 558.

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8. "CHILD," as used in the definition of aggravated assault, is not synonymous with *minor*, or one under twenty-one years of age, but is used in its ordinary signification.

APPEAL from the County Court of Kaufman. Tried below before the Hon. H. P. TEAGUE, County Judge.

The offence proved was four blows with a rope administered to a youth of sixteen years. The conviction before the justice was on complaint of the youth himself, and he also filed the affidavit on which the information for aggravated assault was founded in the present case, wherein the jury assessed against the appellant a fine of \$100.

An eloquent and erudite argument was filed for the appellant by some one whose modesty deterred him from appending his name thereto.

Thomas Ball, Assistant Attorney-General, for the State,

WHITE, P. J. On the trial, which was under an information for an aggravated assault, defendant pleaded former conviction for a simple assault, upon a valid prosecution founded upon and growing out of the identical transaction involved in this case. In submitting this special plea to the jury, the court instructed them as follows: "In this case, if the jury find the defendant guilty of an aggravated assault and battery, they will not consider the special plea of defendant that he has before been convicted of the offence charged herein, but you will assess the punishment as hereinbefore defined." The punishment before defined was that assessed by the old law, of not less than \$100 nor more \$1,000, etc. Pasc. Dig., art. 2153.

At the time the trial was had and the charge given, to wit, 5th of August, 1879, the new Code was in operation, and the punishment for aggravated assault as affixed therein is "by fine not less than twenty-five nor more than one thousand dollars, or imprisonment in the county jail not

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less than one month nor more than two years, or by both such fine and imprisonment." Rev. Stats., Penal Code, art. 498. Defendant was entitled to the punishment under the new law, it being in amelioration of the former, unless he had elected to receive the penalty prescribed by the law in force when the offence was committed. Rev. Stats., Penal Code, art. 15. This was a fundamental error. *Haynes v. The State*, 2 Texas Ct. of App. 84.

But the charge quoted was excepted to, and counter charges upon the special plea of former conviction were asked, and were refused by the court. It is strenuously insisted that the court erred in the charge given, and in refusing the special instructions asked, and we are cited to precedent and authority supporting the doctrine that the plea of *autrefois convict* or *acquit* is good "when the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first; and this is true although the first trial was for a misdemeanor and the second for a felony." *Thomas v. The State*, 40 Texas, 39. "And that the prosecutor had a right to carve as large an offence out of the transaction as he could, yet he must cut only once." *Quitow v. The State*, 1 Texas Ct. App. 47. As thus declared, the rule of practice is beyond controversy; but it is not applicable in the present case. We had an express statute, before the adoption of the Revised Statutes, which regulated such cases and prescribed a different rule. It provided "that when a special plea alleges that the defendant has been before acquitted or convicted of the same offence upon a trial in a Justice's Court, and it appears on the trial, from the facts proved or the law governing the case, the court had no jurisdiction, the former conviction or acquittal shall have no effect whatever, and it is not necessary for the district attorney to reply to the plea in order to present the question of jurisdiction." Pasc. Dig., art. 2980.

A case directly in point, and one strictly in conformity

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with the charge given, is *Prine v. The State*, 41 Texas, 300. Henceforth such a question cannot arise in any cases not tried upon indictment or information; for the law now is that “a former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offence, but shall not bar a prosecution for any higher grade of offence over which said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offence.” Rev. Stats., Cr. Code Pr., art. 553.

We are of opinion also that the court erred in refusing the first special instruction asked for defendant, in the following words: “The court instructs the jury that the term *child* means one of tender years, not a minor or under twenty-one years of age, and that they must take the word in its common acceptation.” A bill of exceptions was reserved to the refusal of the court to give this charge. This special instruction was in keeping with the law upon that subject announced by this court in the case of *McGregor v. The State*, 4 Texas Ct. App. 599.

For errors committed by the court as above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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L. M. NOFTSINGER v. THE STATE.

1. **MURDER.** — Appellant was tried since the Revised Codes took effect, for murder committed prior thereto, but filed his written election to receive the penalty prescribed by the law in force when the offence was committed, which was death without alternative, instead of death or confinement in the penitentiary for life, as provided by the Revised Penal Code, art. 609. The court below instructed the jury that if they found the defendant guilty of murder in the first degree, they would simply so say by their verdict, without concerning themselves about the punishment. *Held*, correct.

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2. **EVIDENCE** may, by express authority of the Code, be admitted at any time before the argument is concluded, "if it appear that it is necessary to a due administration of justice." The exercise of the discretion thus conferred on the court below will not be revised on appeal, unless it be made to appear that the discretion has been abused to defeat the ends of justice.
3. **CIRCUMSTANTIAL EVIDENCE.** — In cases dependent on circumstantial evidence exclusively, greater latitude is properly allowed in the presentation of the evidence than when direct and positive testimony is relied on for a conviction. Strange conduct, or unwonted agitation and emotion of the accused may be competent evidence for the prosecution in such cases. Note the apposite illustration afforded in the present case.
4. **PRACTICE.** — Statements elicited by a party from his own witness are legitimate matter for the cross-examination.
5. **ACCOMPLICE TESTIMONY.** — Concealment of knowledge that a felony is to be committed does not make the party concealing it an accessory before the fact, nor necessitate corroboration of his testimony.
6. **FACT CASE.** — See circumstantial evidence held sufficient to support a conviction for murder in the first degree, and to exclude all reasonable doubt.

APPEAL from the District Court of Cooke. Tried below before the Hon. J. A. CARROLL.

The indictment charged Noftsinger, the appellant, with the murder of Willis Cline, on August 7, 1878, by shooting him with a gun. The trial was had in August, 1879. The defendant filed a "motion" in which he declared his election to be tried under the law in force before the Revised Codes took effect. Many witnesses were examined, of whom none save the victim's wife was present at the scene of the assassination, and as it was perpetrated in the night, she was unable to state by whom it was committed. The evidence for the State, therefore, was purely circumstantial, but elicited from the jury a verdict of murder in the first degree; upon which the court, in conformity with the law anterior to the Revised Codes, adjudged the death-penalty.

Mrs. Helen Cline, the widow of the deceased, was the first witness introduced by the State. She testified that he died of a gunshot wound, at his home, about four miles north of Dexter in Cooke County, between ten and eleven o'clock in the night of Wednesday, August 7, 1878. The

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weather being warm, they had put a mattress on the floor of a porch situated on the north side of the house, and she was asleep by her husband's side at the time he was shot. Her first sensation was the sound of something which seemed like the bursting of a cap. She was stunned, and felt as though she was suffocating from the smoke of gunpowder, and on waking sufficiently she saw that the top part of her husband's head was lying over on his face. She replaced it, and got a dipper of water and washed his face; and then saw that he was dead. She screamed and tried to alarm the neighbors; and then started to Mrs. Sparkman's, a near neighbor, and on the way met that lady coming, and told her what had happened, which so alarmed Mrs. Sparkman that she returned to her own home. Witness then went back to her house, lighted a lamp, and again looked at her husband; and once more started to Mrs. Sparkman's, and on the way was met by that lady, her daughter, two of her sons, and Mr. Boyd, and with them came back again to her house.

Witness and her husband had been married only three days over a month at the time he was murdered. She had known Noftsinger, the defendant, for two years or more previous to that event. At one time she had been engaged to him, and they expected to marry in the fall of 1878; but the engagement was broken off about March of that year by the witness, on account of his complaints about her dancing with Cline, to whom it appears she had been engaged before her engagement with Noftsinger. In the spring of 1878, before her engagement with Noftsinger was broken off, he wrote her a letter in which he stated that Mr. Cline was a low-down pup, and that he would not keep company with a lady who would dance with such a man. Subsequently, at the defendant's request, she returned to him all his letters to her, except the one about Mr. Cline; and he would not believe her explanation that it was lost, but insisted that she had sent it to Mr. Cline, and said if she had,

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and Cline refused to give it up to him, he would kill him. Witness said to him, "You surely would not kill a man for such a cause as that;" to which he replied that he would; that when he was in a good humor he had as good a heart as anybody, but when he was mad he had as mean a heart as ever beat in a human bosom.

On Tuesday night of the week before the murder, just as she and her husband had gone to bed, a gun was fired close by the house, and next morning they saw shod-horse tracks near the corner of the lot. Mr. McGuinn had formerly lived in the house, but had moved away three or four weeks before the murder. The night of that event somebody suggested that the assassin had mistaken Mr. Cline for McGuinn, whose life had been threatened by many enemies.

On the cross-examination, Mrs. Cline stated that she had not told, at the examining trial, of the defendant's threat to kill Mr. Cline if he did not give up the letter. That trial was held within a few days after her husband's murder, and her distress then disabled her from remembering minutely all that had occurred. The night of the murder was a bright night; the moon was shining.

Charles Craig, for the State, testified that about dusk on Tuesday or Wednesday evening, a week before the murder, he met the defendant about a half or three-quarters of a mile from Dexter, on a road which passed within half a mile of where Cline then lived. Defendant was riding a small gray horse. He and witness exchanged salutations, but no conversation passed between them. Between where the defendant was and Cline's, the road forked, and witness could not say which fork the defendant took.

T. Hill, for the State, testified that he lived within a quarter of a mile of Cline when the latter was murdered. On Tuesday night in the week previous to that event, after dark and after he had taken his supper, he saw a man with a gray horse standing in the road near the house, who inquired of witness the way to Dexter; and on being directed

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to the Dexter road, about two hundred yards distant, went off towards it. Just as he rode off, witness asked him his name, but received no reply, and could not say that the man heard his inquiry, though it was loud enough. After the lapse of about sufficient time for the man to have reached the Dexter road and return from it to witness's house, some one riding a similar gray horse came past the house and went on towards Cline's; and in a half or three-quarters of an hour, witness heard the report of a gun or pistol in the direction of Cline's house, and within a few minutes a man riding a small gray horse came riding down a ravine which leads from that direction to the country road at witness's house; and the man, on reaching the country road, turned east and went towards the road which leads to Dexter. The appearance and gaits of the horse or horses thus repeatedly seen by the witness were similar. The next morning he examined the road where he had first seen the gray horse, and there found tracks of a horse which was shod all around. He could not say positively that the horse he first saw was a gray; it was of a light color, and may have been a light dun. Witness knew the defendant, but could not swear he was the man thus seen on either of the three occasions. He thought, however, that the horse was the same on each of them.

Mrs. Hill, wife of the last-mentioned witness, testified substantially as he did, but added that she was well acquainted with Noftsinger, the defendant, and knew his voice; and when the man was getting her husband's directions to Dexter, she thought she recognized his voice as Noftsinger's, and told her husband, at the time, that the man was Noftsinger.

J. C. Darnall, for the State, testified that he loaned the defendant a medium-sized, small gray horse, shod all around, on the Tuesday or Wednesday of the week preceding the week in which Cline was killed. Defendant said he wanted the horse to ride out two or three miles. Witness

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did not know whether the defendant rode the horse or not, but he did not return him until the next day.

B. Bennett, for the State, testified that the defendant applied to him for the loan of a pistol two or three days before Cline was killed. Witness had no pistol to lend to the defendant, but asked him if any thing was the matter; to which he replied, "No, nothing much."

Lewis Williams, for the State, testified that, on the day before Cline was killed, the defendant employed him to go after E. S. Gardner (who is separately indicted for the murder of Cline), whom he wanted to do some hauling; and he instructed witness to tell Gardner to be sure to come that night. The night on which Cline was killed, witness saw Gardner and the defendant, after dark, talking behind Whittington's store, in which the defendant was a clerk. Later and about nine o'clock of the same night, witness was talking to Julia Love in a lot adjoining the lot behind Whittington's store, when the defendant, walking half-bent, and having something like a walking-stick in his hand, came through Whittington's lot behind his store, and crossed over the fence into the lot and close to where witness and Julia Love were talking. She asked witness who that was, and he told her it was Mr. Noftsinger; and witness thought that George Porter, who was in the lot and close by, heard his reply to Julia Love. Witness did not make the trip after Gardner, because just as he got ready to start Gardner came to town.

W. S. Barnes, testifying for the State, said that he lived a half or three-quarters of a mile from Dexter at the time Cline was killed, which event took place in the night of Wednesday, August 7, 1878. On the previous night (Tuesday, August 6), just after dark, witness started on horseback to Dexter. About half-way he met the defendant, who was on foot, and they stopped in the road. Defendant said he was on his way to see witness at his house, but would turn back with witness to Dexter. They proceeded about

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a hundred and fifty yards towards Dexter, when defendant stopped by the roadside, and said he would see witness in town and would have a talk with him. In a few minutes after witness reached Dexter, the defendant came and asked him into a saloon to take a drink; after which they went out behind the house, and the defendant said he was going out the next night to have some fun, and that he wanted witness to go with him. He said he was going three or four miles north of Dexter, but did not tell where to, nor what kind of fun he was going to have. He asked witness to come to town again the next night. In compliance with the request, witness did come to town the next night, and again took a drink with the defendant at a saloon just east of Whittington's store, and back of which is an enclosed lot which is separated by a fence from the lot behind the store. They went into the lot behind the saloon, and the defendant got over the fence into Whittington's lot, while witness stopped in the lot in rear of the saloon, and by the fence. Defendant told witness that he was going out north three or four miles, and wanted witness to go with him. Witness asked him where he was going, but he would not tell. He said he was going to get away with a man; that a man had deprived him of his pleasure, and that he intended to deprive that man of his. Witness told him that he would not go with him if that was what he wanted. He then said that he was not going that night; "That is all right, Gardner is going with me any way, and too many fingers in a pie spoils it." Witness told him that if he intended to get away with a man the way witness thought he did from the way he talked, that he (witness) would have nothing to do with it; and said to him, "If you do that, they will catch you and break your d—d neck." During the conversation, defendant said he had always regarded witness as a brave man, and for that reason wanted him to go with him. When witness said he would not go, the defendant asked him to say nothing about what had passed between them, and wit-

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ness promised that he would not. Witness asked if there were any No. 8 shoes in the store, and he replied that there was not, and walked off towards the back-door of the store. Witness walked off the other way, and saw no more of the defendant that night. In the conversation of the previous night the defendant asked witness where he (witness) could get a horse to ride the next night. Witness replied that he could get one from Tally, out at Whittington's pasture; and defendant said he could get one there too.

On cross-examination, Mr. Barnes said that about Dexter he was generally known as "Gas Barnes," because, he supposed, he was a great talker. He and the defendant were well acquainted, but had never slept or worked together, or been confidential with each other, though they had had some secret talk. After Cline was killed and Noftsinger and Gardner arrested, witness told R. M. Bourland, Sheriff Ozment, and perhaps some others, what Noftsinger had said to him. To others he said that he knew nothing about it; for which his reason was that he had understood that Gardner belonged to a horse-thieving party, numerous in those parts, and he was afraid of them. Defendant never told witness who it was he intended to get away with, nor what he meant by getting away with a man. The defence, as part of their cross-examination of this witness, introduced his testimony at the examining trial, which showed, in several minor matters, inconsistencies with his testimony at the bar.

J. C. Tally, for the State, testified that he, at the time Cline was killed, lived about three-quarters of a mile from Dexter, on a place where there was a pasture, which then contained several horses, and among them a horse of Whittington's which was shod all around. Between sundown and dark on the night of the murder, a man came with a bridle or halter, and inquired for Whittington's horse, which witness showed him, and he caught and took the horse away. He borrowed from witness a saddle-blanket, to ride to Dex-

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ter, and said he would return it the next morning along with the horse. Witness's eyes being sore, he could not see well at the time, and paid no attention to the man. Witness had no control over the horse, and the man did not ask his permission to take it. When witness got up the next morning, the horse was in his yard and garden, and the blanket hanging up in a tree near the pasture gate, about a hundred yards from the house. Witness was not then acquainted with Gardner, but saw him very soon after he was arrested, and observed that his hat and shirt were like those of the man who got the horse, and that he wore his pants in his boots, as did the man who got the horse; but witness could not say that Gardner was the man spoken of.

J. M. Winters, a witness at the examining trial, having since died, the State introduced his evidence thereat. It appears therefrom that he was a deputy-sheriff, and, the next morning after Cline's murder, assisted R. W. Bourland in searching for evidences about the scene of the crime. They found around and near the premises, and along the road from there to Dexter, some peculiar horse-tracks, and subsequently examined the tracks of a mare belonging to Gardner, and believed them to be the tracks of the same animal. The tracks near Cline's were barefooted tracks; but Gardner's mare, when they saw her, had shoes on her fore-feet. This apparent confutation of their conclusion, however, was explained by another witness, who, early in the morning after the murder, saw a blacksmith putting shoes on Gardner's mare. Winters went to Dexter to assist in the arrest of Gardner and Noftsinger, and the first man who accosted him was Gardner, who asked him about the murder and inquired who was suspected of it. Noftsinger soon after sent word to witness to come over and see him at Whittington's store; and on witness doing so, Noftsinger took him into the back room and asked him who people thought did it, and if any tracks were found about Cline's place. Gardner and Noftsinger had not then been arrested;

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they both seemed uneasy and their talk was excited. Noftsinger told the witness that he could have killed Mr. Cline once if he had wanted to; that he and Cline had a fight at a party.

R. M. Bqurland, for the State, testified that he went to Cline's about sunrise on the morning after the assassination, and found the deceased still lying on the mattress. His description of the corpse is even more ghastly than Mrs. Cline's. The blood and brains were spattered on the wall up to the roof of the porch and along the under side of the roof. He found some shot on the bed and floor; they were mashed, and seemed of different sizes, some being as large as large-sized buckshot. He also picked up from the bed a piece of white tissue paper, which appeared to have been used as gun-wadding and fired out of a gun. His account of the horse-tracks concurred with that of Winters, already given. He arrested Noftsinger about ten o'clock in the day, and thought him the worst scared man he had ever seen. He searched Whittington's store, and found under the counter a double-barrelled shot-gun, the left barrel of which appeared to have been recently discharged, judging by the indications at the muzzle and the tube. The right barrel was still loaded, and witness drew out the charge, and found the wadding to be white tissue-paper, exactly, so far as he could tell, similar to that he found on Cline's bed; and he produced the two pieces of paper of which he spoke. He also took from the right barrel nineteen buckshot, among which were four different sizes. That same morning, but before the arrests, he and Barnes were in Whittington's store when a man came in and did some trading with Noftsinger, who, as soon as the man went out, asked Barnes who the man was, adding that he had sold him some goods on the order of another person, and did not ask him his name. Barnes told him he did not know who the man was, and further said to him, "What is the matter with you to-day? You must be crazy; you sold that

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woman, awhile ago, more calico than she paid you for. You had better go off and go to bed.” Noftsinger made no reply, but turned and walked off. When the gun was found under the counter, the left barrel, which seemed to have been recently discharged, had been reloaded with squirrel-shot. Witness drew out this charge, and found the wadding to be newspaper.

By W. F. Whittington, the owner of the store in Dexter, the State proved that he was absent from home when Cline was killed, having started the previous morning to Sherman with a wagon. He had occasionally hired Gardner to haul for him, but when he started to Sherman he left no instructions or authority with Noftsinger to employ Gardner or any one else to do any hauling. On the contrary, just before starting he told Noftsinger to tell Gardner, if he should see him, not to apply to witness for any more work. Defendant had authority to use witness’s horse and saddle at any time, and in witness’s absence had the charge of his affairs. Defendant had been in his employ for nearly two years, and bore a good character as a peaceable and law-abiding man.

E. W. Conrad, testifying for the State, said that just after breakfast in the morning succeeding the night of the murder he saw a blacksmith shoeing Gardner’s mare. This witness also stated that the gun found by Bourland in Whittington’s store belonged to him (the witness), and had been borrowed from him by Noftsinger about a week before the murder, to kill cats with. Witness next saw it in Bourland’s possession the day after that event, and the left barrel had then the appearance of having been recently discharged.

This witness, when Cline was killed, was a merchant in Dexter, and occupied a storehouse nearly fronting Whittington’s, and having a porch in front of it, upon which he put his couch and went to bed the night of the murder. After awhile he was aroused by the barking of a dog, and, looking around, saw a man coming up the street from the west,

Statement of the case.

whom at first he did not recognize, but when he came nearer he saw it was the defendant, who stepped up on Whittington's porch, and, as witness thought, unlocked and relocked the front-door of Whittington's store. He then turned and went to a double gate leading into the lot behind that store, opened the gate, and entered the lot. In a few minutes, he returned through the gate, crossed the street, and walked off in a northerly direction. In a very short time, he came back from that direction, crossed the street, and entered the gate, carrying something which witness took to be a saddle. In a little while, witness heard the back-door of Whittington's store open, and some one walk through to the front door, open it, and step out on the porch. This was the defendant; witness halloed at him, saying, "Hello! young man, what are you doing there? I've been watching you." He replied, "That is all right," went in the house, shut the door, and witness saw no more of him that night. About five minutes afterwards, Gardner came riding up from the west, dismounted at the gate behind Whittington's store, opened it, and led his horse into the lot. The witness does not exactly fix the hour of these movements of the defendant and Gardner, but gives *data* which imply that it must have been nearly or quite midnight. Doubtless the prosecution inferred that those parties were returning from Cline's after accomplishing the murder.

On his cross-examination, the witness could not say whether his gun was loaded when he loaned it to the defendant. He did not see a gun in the hands of either the defendant or Gardner the night of the murder. He also gave the defendant an excellent character as a peaceable and law-abiding man, previous to this charge against him.

The foregoing is the substance of the evidence for the State, omitting, of course, a great deal of detail and collateral matter of no special significance.

The defence first introduced Julia Love, who remembered her interview with the State's witness, Williams, the night

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Cline was murdered; but she positively denied his statement about the defendant passing near them on that occasion, and all his testimony connected therewith.

George Porter, to whom the witness Williams referred as a by-stander who probably overheard the conversation between him and Julia Love, testified for the defence that he saw Williams and her talking together early in the night of the murder, but did not see Noftsinger pass them, or hear any mention of him by Williams or Julia Love. But witness heard Williams say something about it the next morning. The State, in the cross-examination, drew out of the witness what was said by Williams the next morning, which was that he (Williams) saw Noftsinger, the night before, get over the fence from Whittington's lot into Dunlap's yard. This was said by Williams early in the day, and before the arrest of the defendant and Gardner.

The defence introduced a witness who testified that he knew the general reputation of the State's witness Williams for truth and veracity, and that it was bad. On cross-examination, his reason for believing it bad was the company which Williams kept. His view of the matter was that a man's reputation for truth and veracity is good if he works and makes a good living and has money; but bad if he is lazy, does not work, and has no money.

Many witnesses for the defence concurred in giving the defendant an excellent character and reputation in all respects. Ten of them were prominent citizens of Botetourt County, Virginia, who had known the defendant there until he left for Texas, some two years before the assassination of Cline. The defence closed by putting in evidence the indictment charging Gardner, as a principal, with the murder.

The opinion discloses all special matters germane to the rulings.

C. C. & C. L. Potter, for the appellant. The first point we will call the attention of the court to is raised

Argument for the appellant.

by the second assignment of error, and relates to the ruling of the court on the objection of appellant to that part of the testimony of the witness R. M. Bourland in which he states what one Barnes said to appellant in Whittington's store the morning after the killing. We recognize the full force of the rule that permits the State to prove not only what appellant said in a conversation, but what others also said in the same conversation. But we understand this rule to be based on two reasons, one of which is that it is necessary to prove what others said, who are engaged in the conversation, in order to fully understand the exact meaning of the words of the party on trial; the other is that a party is bound by what others say with reference to himself, in his presence, if he does not deny or repudiate it. When these reasons fail, like all other rules, this rule ought not to be invoked.

We do not think that any sound reason can be given for the admission of this testimony. This statement of Barnes is not necessary to understand any thing said by appellant; nor was there any thing in the remark of Barnes that could reasonably have called forth any reply from appellant, or bind him by acquiescence; nor could the appellant be supposed to think that the remark of Barnes had any reference to the murder of Cline, or his connection with it. This seems to be an effort to get before the jury the opinion of Barnes as to the conduct and appearance of the appellant on the morning after the killing. The State had an opportunity of availing herself of this gentleman's opinion on this subject when he was on the witness-stand, and that supported by the sanction of his oath, without resorting to this hearsay process. The testimony tended to prove no fact in the case, nor to shed any light upon it, but resulted in injury to appellant by prejudicing him in the minds of the jury.

We think the court below committed a very great error in permitting the witness George Porter to testify as to the import of a conversation between himself and the wit-

Argument for the appellant.

ness Lewis Williams on the morning after the killing. We think this testimony purely hearsay, and we know of no rule of law that would justify its admission. The appellant had introduced no part of said conversation, though it is true that, in answer to appellant's question as to whether he heard the witness Lewis Williams, on the night of the killing, speak of seeing the appellant pass by, he replied, "No, but that he heard him say something about it next morning." The part of the answer that recites this conversation was not in response to appellant's question, and he ought not to be held responsible for it. But it only recites the fact of a conversation having occurred between them on this subject, without stating any part of the conversation. The State had no right to strengthen or corroborate the testimony of the witness Williams in this manner. There may be some law and reason, where a witness is sought to be impeached by proving contradictory statements, to permit proof that he had frequently made the statement out of court that he made on the stand. But it is a strange rule indeed that will allow a party to strengthen the testimony of a witness by proving that he had told the same story out of court that he tells in court, when the only effort to destroy the testimony of the witness is by the testimony of other witnesses who were present and contradict him directly as to the facts testified to by him. There can be no doubt but this testimony greatly influenced the minds of the jury against the appellant. One of the most important facts for the State to establish, and one that great effort was made to establish, was that appellant was out of his business house at the proper time on the night of the killing, and that he had a gun. The witness Williams testified that he saw appellant leave his store about nine o'clock on the night of the killing; that he was travelling in a stooping position, and had something in his hand like a stick. This was all, in the shape of direct evidence, that the State had to show that appellant was out of his busi-

Argument for the appellant.

ness house on the night of the killing, or that he had a gun with him; hence the truth or falsity of Williams's testimony on this point becomes of the utmost importance to both the State and appellant. And we think the improper admission of any evidence that the jury might think calculated to strengthen the testimony of said witness would be good ground for reversal.

We call attention to the error complained of in the sixth assignment. We are clearly of the opinion that the court should have charged the jury the law with reference to the evidence of an accomplice, in view of the testimony of the witness Barnes. While it may be true that this witness was connected with appellant just to the extent that he says he was, and no farther (if in fact appellant had any connection with the murder of Cline), and it may be true that he knows just what he testified that he knew, and nothing more, with reference to the appellant and the killing of Cline, still, if true, it is contrary to human experience, and it is a great tax upon any one's credulity to accept it as such. It is by no means probable that, on the night previous to the killing, the appellant should have had a conversation with this witness and requested him to go on this bloody mission, without first imparting some knowledge of the character of the transaction in which they were jointly to embark, and in some manner learning something of the willingness of the witness to join him; and another strange part of this story is that there should be such a full and perfect understanding between these parties as to the details of the trip, — such as to where witness should get a horse, at what hour of the night he should come to town, and at what place he should hitch his horse, — and still not a word be said as to the purpose and nature of the trip. And what is still more improbable, according to the story of this witness, is that, on the next night after this conversation, and on the night of the killing, he, having procured a horse, came to the town of Dexter at the appointed time,

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fastened his horse at the place designated, and then for the first time had a conversation with appellant in regard to the character of the business they were about to enter upon, and then learned for the first time from appellant that the mission was unlawful and that appellant meant to kill some man. It is true that he says he declined to go when he heard the unlawful nature of appellant's design; but then, according to his testimony, he made no effort to restrain appellant, but, upon the contrary, promised appellant that he would not mention what he knew about it.

We think on his evidence alone the jury were warranted in believing that, if appellant was implicated in the murder of Cline, this witness was also engaged in it. But if we accept his testimony as true, and view it in the light of the other evidence, he is clearly an accomplice or accessory, if not a principal actor. We find from his own statement that he knew appellant was going to kill a man. The intimate and confidential relations which existed between himself and appellant in regard to this transaction called loudly upon him at least to make some effort to persuade appellant to desist. But he not only fails to interfere in any manner, but he actually agrees to keep it secret, thus concealing the crime from discovery and the perpetrator from prosecution. But for this agreement on the part of this witness, this brutal tragedy might never have been enacted, if indeed the appellant was an actor in it. We can perceive no distinction in the aid thus given by this witness to the alleged perpetrator of this crime, and the aid given when a party furnishes the weapon with which to commit the crime. If the weapon were withheld in the one instance, perhaps no crime would be committed; if the promise were withheld in the other, in all probability no crime would have stained the hands of appellant (if in fact he committed the deed). But, in addition to this, we find him next morning, after the news of the murder had spread over the country and startled the people into commotion,

Argument for the appellant.

and when Barnes, if what he testified to be true, was bound to know that appellant was at least connected with the crime, in the store with appellant; and, doubtless alarmed that appellant's strange demeanor would betray him and lead to his arrest, he advises him to go to bed, and thus conceal himself from public view. And we further see that when Whittington, the employer of appellant, returns home the day after the killing, and asks this witness what he knew with reference to it, he denies knowing any thing about it, and says if he did he would tell. All this conclusively shows that Barnes was such a participant in the crime as to subject his testimony to the rule that requires the evidence of participants to be corroborated. *Barrara v. The State*, 42 Texas, 260; *Williams and Smith v. The State*, 42 Texas, 322; *Carroll v. The State*, 3 Texas Ct. App. 117; *Davis v. The State*, 2 Texas Ct. App. 606.

We believe the evidence in this case demanded from the court an instruction to the jury as to what would be their duty in the event that they believed that appellant only participated in the murder of Cline as an accomplice. It appears from the evidence of Lewis Williams that on the day before Cline was killed at night, appellant wanted witness to go after E. S. Gardner and tell him to come to Dexter that evening; but before witness started, Gardner came in. And it appears from the evidence of Barnes, that when he had the conversation with appellant on the night Cline was killed, appellant told him that he was not going that night; as Whittington was away, he was afraid to leave the store alone. The proof fails to identify but one horse-track along the road from Dexter to Cline's, and that is claimed to be the track of Gardner's mare. It is not shown that appellant had a horse that night, and it fully appears from all the evidence that he did not go to Cline's afoot. There is no proof that appellant left the store that night, except by the witness Lewis Williams, who is flatly contradicted by two witnesses equally as credible as he.

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Gardner returned alone to Whittington's store after eleven o'clock on the night Cline was killed; he was on horseback, and it is supposed he was riding the mare whose track it is claimed was identified along the road from Dexter to Cline's. It is not claimed that there was or could have been but one gun used or carried to Cline's that night. All this renders it highly probable that if appellant had any thing to do with the murder of Cline, he procured another to commit the act, while he was not present. If this position be borne out by the evidence, the court should have instructed the jury to acquit if they believed appellant only acted as an accomplice, as he could not be convicted as such under the indictment. 1 Bishop's Cr. Law, 542. Besides, the jury should have been instructed that before they could convict appellant they must believe the evidence introduced to be sufficient to convict the principal. Rev. Penal Code, art. 85.

Thomas Ball, Assistant Attorney-General, for the State.

1. It is contended by appellant that the witness Barnes was and is an accomplice in the murder of Cline, and for that reason the court should have charged on the necessity of corroborating his statements. For the State it is submitted that on an examination of the evidence it will appear that Barnes was and is not an accomplice, in any legal view. See Whart. on Hom., sects. 345, 346; Penal Code, art. 86.

2. Defendant did not except to the charge of the court because on the weight of evidence, and therefore it will not be reviewed. *Robinson v. The State*, 24 Texas, 154; *Bishop v. The State*, 43 Texas, 290.

3. No exceptions were taken to the charge of the court, and no special charges were asked. *Williams v. The State*, 41 Texas, 209; Code Cr. Proc., art. 27; Code Cr. Proc., art. 685.

4. The counsel for the State did right, on cross-examination, to have the witness Porter relate the talk he and

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Williams had the morning after the murder: *first*, for the purpose of showing that the witness Williams had told the same tale before as on the trial, about the occurrence of the night of the killing; *second*, to get the whole of the conversation, the existence of which, and the matter to which it related, having been drawn out by defendant in his direct examination of his own witness.

5. It was admissible to prove the acts and doings of defendant as well after as before the killing occurred. *Handline v. The State*, 6 Texas Ct. App. 347.

WHITE, P. J. On the night of the 7th of August, 1878, one Willis Cline was assassinated, between the hours of ten and eleven, at his home, four miles north of the village of Dexter in Cooke County. At the time he was murdered, he and his wife, to whom he had been married but little over a month, were asleep upon the porch upon the north side of the house. On the following morning appellant and one E. S. Gardner were arrested as the perpetrators of the deed, and each was separately indicted for the murder at the February term, 1879, of the District Court. At the August term, 1879, this appellant was tried and found guilty, and his punishment affixed at death by hanging.

A noticeable feature is presented by the record in this case. Between the date of the filing of the indictment and the time of trial, to wit, on the twenty-fourth day of July, 1879, our Revised Penal Code had become operative, and by its express provisions the punishment for murder in the first degree was changed from death absolutely, as provided in the old law (Pasc. Dig., art. 2271), to death or confinement in the penitentiary for life. Rev. Stats., Penal Code, art 609.

By art. 15, chap. 1, of the Penal Code it is declared that “when the penalty for an offence is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed

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before the second shall have taken effect. In every such case the offender shall be tried under the law in force when the offence was committed, and, if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offence is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offence was committed." In pursuance of this provision, defendant on his trial moved the court in writing to permit him to elect to receive the punishment fixed by the law in force at the time the crime was alleged to have been committed; that if convicted he did not desire to receive the punishment fixed by the law now in force. His motion was granted by the court, and the jury were appropriately charged with regard to the punishment under the old law.

The case is one of entirely circumstantial evidence. Two bills of exception are found incorporated in the record, which are mainly relied on as cause for reversal in the very able and ingenious oral argument and brief of counsel for appellant. With regard to the supposed error contained in the first portion of the first bill,—to wit, that the court permitted the prosecution to withdraw the announcement made the evening before, that the testimony was closed, without assigning a reason for asking such withdrawal, and allowed the introduction of other testimony over objection of defendant,—such practice is authorized by the Code, which provides that "the court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice." Rev. Stats., Code Cr. Proc., art. 661. And the discretion thus confided in the judge will not be subject for revision, "unless it be made to appear that the discretion has been abused to defeat the ends of justice." *Kemp v. The State*, 38 Texas, 110; *Roach v. The State*, 41 Texas, 262; *Sherwood v. The State*, 42 Texas, 498;

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Harris v. The State, 44 Texas, 146; *Treadway v. The State*, 1 Texas Ct. App. 668; *Lister v. The State*, 3 Texas Ct. App. 17.

The latter portion of this first bill of exceptions is saved to the admission of a certain portion of the testimony of the witness Bourland, who stated: "I was in Whittington's store on the morning after Cline was killed, and before Noftsinger and Gardner were arrested. While I was there, a man came in and did some trading with Noftsinger. As soon as this man went out, Noftsinger asked Barnes, who was also in the store, who the man was that he had traded with. He said he had sold him some goods on the order of another person, and did not ask the man his name. Barnes told him he did not know who the man was; and also said to Noftsinger, 'What is the matter with you to-day? You must be crazy; you sold that woman, awhile ago, more calico than she paid you for. You had better go off and go to bed.' Noftsinger made no reply, but immediately turned and walked off."

It is not perceived why this evidence should be held inadmissible. The conversation was one between the defendant himself and Barnes; and Barnes's *impromptu* declarations to him, in consequence of the strangeness of his conduct, tend to establish the fact that immediately after the homicide was found to have been committed his conduct was not in keeping with what it was ordinarily. "In a case like the present, depending wholly upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived." *Cooper v. The State*, 19 Texas, 443; *Barnes v. The State*, 41 Texas, 351; *Hamby v. The State*, 36 Texas, 523; *Black v. The State*, 1 Texas Ct. App. 368. And in such cases the nature of the case, in many instances, demands a greater latitude in the presentation of the evidences of the circumstances than where a conviction is sought upon direct and positive testimony. *Ballew v. The State*, 36 Texas, 98.

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Criminative or inculpatory circumstantial evidence is derived from the *conduct* of the party accused, and external objects or physical facts with their appearances as indicative of such conduct. "Hence," as is well remarked by Mr. Burrill, "where a case of suspected crime has become the subject of judicial investigation, and the general fact of the commission of a crime has been ascertained, and particularly where vigorous measures have been set on foot to trace out the individual perpetrator, the idea, now converted into prospect, of discovery, and that becoming a more and more probable event as fact after fact is brought to light, naturally and almost necessarily fills the mind with alarm; particularly where the criminal finds his own person drawn (or is likely to be drawn) within the sphere of investigation. Emotion and agitation exhibited under such circumstances, especially when no charge of guilt has yet been made or insinuated, are regarded, and justly, amongst the most convincing evidences of criminal agency that can be submitted to a human tribunal." Burrill on Cir. Ev. 466. The court did not err in admitting, or in refusing to strike out, this evidence. *Handline v. The State*, 6 Texas Ct. App. 348; Roscoe's Cr. Ev. 18, 19.

It is insisted, and this is the point reserved in the second bill of exceptions, that the court committed a grave error in permitting the witness George Porter to testify as to the import of a conversation between himself and the State's witness Lewis Williams on the morning after the killing. Lewis Williams, when on the stand, had testified that he had seen the defendant leave the storehouse the night of the killing, and pass through a lot not far from where he (the witness) was talking to one Julia Love; that he told Julia Love it was Mr. Noftsinger, and he thought George Porter heard him tell her so. The defence introduced Porter to contradict this statement of the witness Williams; which Porter did, he testifying, on his examination-in-chief, "I did not see Noftsinger, nor did I hear Williams tell me

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nor any one else that night that he saw Noftsinger, but I heard him say something about it next morning." On cross-examination, the State's counsel asked the witness what the witness Lewis Williams said, the morning after Cline was killed, about seeing the defendant the night before; which question and answer were objected to, but the objection was overruled, and the witness permitted to testify that early the next morning, before Noftsinger and Gardner were arrested, the witness Williams told him he saw Noftsinger the night before get over the fence from Whittington's lot into Dunlap's yard.

The matter having been drawn out by the defence on the examination-in-chief, it was a legitimate subject for cross-examination by the prosecution. 1 Greenlf. on Ev., sects. 448, 449.

It is strenuously urged that the witness Barnes was a *particeps criminis*, coming within the rule of accomplices which requires that their testimony shall be corroborated. Pasc. Dig., art. 3118; Rev. Stats., Code Cr. Proc., art. 741. More properly speaking, if we understand the position of defendant's counsel, the witness is claimed to be an accessory,—that is, "one who, knowing that an offence has been committed, conceals the offender." Rev. Stats., Penal Code, art. 86. But in either view of the case, whether as an accomplice or accessory, we do not think the position is maintainable. Barnes neither advised nor encouraged the defendant in the commission of the act, before it was done (Rev. Stats., art. 79), but, on the contrary, states that defendant never told him where he was going. "He would not tell me," says the witness. "He said he was going to get away with a man; that a man had deprived him of his pleasure, and that he intended to deprive that man of his. I told him if that was what he wanted, I would not go with him. He then said, 'I am not going to-night.' * * * I told him if he intended to get away with a man the way I thought he

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did from the way he talked, that I would have nothing to do with it. And I said to him, 'If you do that, they will catch you and break your d—d neck.' Such language and conduct on the part of the witness was, in our opinion, any thing but encouraging, at least in the statutory sense. But it is said he promised defendant that he would say nothing about the matter, and that he did not tell what the defendant told him till some time after the killing. Mr. Wharton says: "The concealment of the knowledge that a felony is to be committed will not make the party concealing it an accessory before the fact, nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence." And if the procurer of a felony repent, and, before the felony is committed, actually countermand his order, and the principal notwithstanding commit the felony, the original contriver will not be an accessory." Whart on Hom. (2d ed.), sects. 345, 346.

The objections urged to the charge of the court are untenable. It appears to be a carefully prepared and able exposition of the law as applicable to the case, and embraced all the different phases in which the facts should be legitimately considered, and instructed the jury most aptly in reference to the rules essential to be observed before they would be warranted in a conviction upon circumstantial evidence alone.

The zealous counsel, in their brief, say, "We do not believe the evidence in the case legally sufficient to sustain the verdict;" but they have failed to point out its defects and insufficiency, either in the oral argument or brief. We have examined the statement of the testimony most carefully, in view of the fact that the life of the accused was being weighed alone in the scales of circumstantial evidence. We have been unable to discover any wanting links in the chain of inculpatory facts, which, commencing with his motives, his grudges, and his threats, go on down regularly, step by step, with sure and unerring certainty, each fact consistent

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with the main fact, and all the facts consistent with each other; and all, as one concrete whole, leading the mind satisfactorily and inevitably to the conclusion of his guilt, beyond the entertainment of a reasonable doubt.

We have found no error in the record of his conviction, and the judgment is therefore affirmed.

Affirmed.

E. KENNON v. THE STATE.

OATH TO JURY. — When the record fails to show that the jury were sworn, the conviction cannot stand, and the cause must be remanded for a new trial.

APPEAL from the District Court of Fayette. Tried below before the Hon. L. W. MOORE.

A. P. Bagby and *T. J. Paine*, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The record before us fails to disclose that the jury empanelled to try this cause were sworn. Without this the conviction cannot stand. Other errors have not been considered; but, for the reason that it does not appear that the jury were sworn, or acted under the sanction of an oath in their finding, the judgment is reversed, and the case ordered to be remanded for a new trial.

Reversed and remanded.

HECTOR STEWARD v. THE STATE.

1. UNLAWFUL MARRIAGE. — By sect. 27, art. 12, of the Constitution of 1869, all persons who were formerly held in bondage, and in that condition lived together as husband and wife, and who, when that Constitution was adopted, were so living together in this State, became legally married; and the

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abrogation of that Constitution by the Constitution of 1876 has not annulled such marriages, nor exempted those who contracted them from amenability to the laws relating to unlawful marriage.

2. **SAME.** — The provision of the Penal Code that, in prosecutions for unlawful marriage, proof of marriage by mere reputation shall not suffice, does not control in such prosecutions against persons whose first marriage was so accomplished by the Constitution of 1869. Proof of facts which constitute a marriage thus consummated is not proof by mere reputation; but to establish such a marriage the proof must show that the accused and his former wife were living together as husband and wife, in this State, on the 30th of March, 1870, when the Constitution of 1869 took effect.

APPEAL from the District Court of Smith. Tried below before the Hon. J. C. ROBERTSON.

The opinion sufficiently indicates the case.

Reaves & Dodd, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. Under the operation of sect. 27 of art. 12 of the Constitution of 1869, all persons who were formerly held in bondage, and who in such condition lived together as husband and wife, and were so living together in this State at the date of the adoption of said instrument, were legally married. The abrogation of that Constitution cannot be construed as annulling such marriages, nor are such persons exempt from prosecution for a violation of our laws relating to unlawful marriage.

Our statute provides that, in trials for this class of offences, proof of marriage by mere reputation shall not be sufficient. *Pasc. Dig.*, art. 2017. This cannot be held to apply to a class of cases in which the contract was established and fixed by organic provision, acting upon a *status* already voluntarily assumed and openly continued by parties theretofore denied the right of legal marriage; and proof of the existence of such relation, originating between parties in a state of bondage and continued until the adoption of that Constitution, is not proof of marriage by mere reputation, but

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the establishment of such facts as, taken in connection with the constitutional provision, fixes the legal marriage as definitely and as certainly as if it had been consummated under the usual forms of law. *McKnight v. The State*, 6 Texas Ct. App. 158.

In construing the act of June 5, 1837 (Hartley's Dig., art. 2439), legalizing certain marriages by bond, in the then Republic of Texas, our Supreme Court say: "It was designed to legalize marriages or associations of that kind, and to put them upon the same footing as if married with the legal sanction of the church." *Nichols v. Stewart*, 15 Texas, 233. Such, we think, was the legal effect and operation of the constitutional provision in question; and persons coming within its operation are entitled to all the rights and privileges of legal marriage, and subject to all prescribed penalties for a violation of any of our laws regulating the institution and intended for the preservation of its sanctity.

The evidence in this case shows that the appellant was a slave prior to emancipation, and lived for many years with a woman, also a slave, both belonging to the same owner; and that on December 27, 1876, he married another woman, the former woman being still alive, and no legal separation having been had. It fails to show, however, that appellant and the former woman were living together in such relation in this State on the thirtieth day of March, 1870, — a fact essential to be shown in order to sustain a conviction.

The court below should have granted a new trial, and for a refusal so to do the judgment is reversed and the cause remanded.

Reversed and remanded.

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J. B. WIMBERLY v. THE STATE.

ASSAULT WITH INTENT TO MURDER. — To charge an assault with an intent to murder, the indictment must expressly allege whom the accused intended to murder. This cannot be left to inference that he intended to murder the person alleged to have been assaulted.

APPEAL from the District Court of Fort Bend. Tried below before the Hon. W. H. BURKHART.

The case is succinctly but clearly stated in the opinion.

Jones & Garnett, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The defendant's motion in arrest of judgment should have been sustained. The indictment charges an assault by the defendant and others upon the person of one Alex. McConnico with a pistol, and made feloniously and upon express malice; and further charges the discharge of the pistol at the said McConnico, "with the wilful and felonious intent and of their express malice aforethought to kill and murder," but fails to state whom they intended to murder. This cannot be left to inference, but must be expressly alleged. Whart. Prec. of Indict., sect. 242; *The State v. Nations*, 31 Texas, 561; *The State v. Patrick*, 3 Wis. 812.

The judgment is reversed and the cause remanded.

Reversed and remanded.

JAMES OWEN v. THE STATE.

1. **PRIVILEGE OF WITNESS.** — In the trial of a husband for an aggravated assault on his wife, she, on her cross-examination by the defence, was asked whether on a former trial she did not testify that she had told the defendant that two men, to whom he forbade her to speak, were in the habit of having sexual intercourse with her. The State objected for

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irrelevancy. *Held*, that the objection was properly sustained for the reason assigned; and that the question was also objectionable because it tended to degrade the witness, and, if answered affirmatively, might have subjected her to civil suit, wherefore she should have been apprised by the court of her privilege not to answer. Note the opinion *in extenso* on the subject.

2. **MISNOMER — VARIANCE.** — Indictment described the assaulted party as Sofia O., and she so gave her Christian name on her direct examination; but on cross-examination she gave it as Sofira, and when reëxamined stated that she was called Sofia as much as Sofira, or more. *Held*, no misnomer or variance, inasmuch as she was known and called as well by the one as the other name. See authorities reviewed in the opinion.
8. **CHASTISEMENT** of the wife by the husband is not permitted by the law of this country, however it may formerly have been in England.

APPEAL from the County Court of Delta. Tried below, before the Hon. C. S. NIDEVER, County Judge.

The trial and conviction were for aggravated assault and battery by the appellant upon his wife. Finding him guilty, the jury assessed his punishment at a fine of \$500.

The defendant's wife was the only witness to the assault and battery. She testified that they were married in December, 1878, and that one night about May 10, 1879, after her husband had retired to bed, she was sitting on the side of the bed, telling him how much she liked him, to which he replied that might do very well if she would not speak to two certain parties any more, and asked her so to promise him. She answered that she would make no child's bargain. "Defendant then reached up and grabbed me by the throat, jerked me down on the bed, choked me, and scratched my face. I began to cry; he then put his knee on my hair, and reached for his pants, in which he carried a pocket-knife, put out the light, and told me to hush or he would fix me so that I could not make a noise. About that time I heard some one coming. There was a scratched place under my eye, and my throat was so sore and swollen that I could hardly swallow for two days." She remained at the defendant's for some two weeks after the occasion thus spoken of.

A brother of hers testified that he, about the 10th of May,

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1879, noticed a scratch upon her face, and in her husband's presence asked her what did it; but she made no reply.

Several close neighbors and daily associates of Mrs. Owen, testifying for the defence, said they heard nothing of the trouble at the time alleged, and noticed no scratch on her face. So far as they could see or judge, the defendant and his wife had been getting along well and happily together.

Perkins & Perkins, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was prosecuted on affidavit and information in the County Court for an aggravated assault and battery, averred to have been committed upon one "Sofia Owen, *alias* Sofia Sandridge;" the affidavit and the information describing the defendant as an "adult male person," and the person alleged to have been assaulted, as a "female." It was developed on the trial that the defendant and the person upon whom the offence is alleged to have been committed were husband and wife, and living together at the date the offence is alleged to have been committed. The trial below resulted in a conviction of the defendant, and the imposition of a fine of \$500. A motion for new trial being overruled, this appeal from the judgment is prosecuted.

The various grounds on which reliance is placed for a reversal of the judgment of the County Court are set out in quite a number of bills of exception taken at the trial, and embraced substantially in an assignment of errors. One ground of error complained of and set out in several of the bills of exceptions, and in different aspects, is that, the principal witness being on the stand, and having testified to the assault upon her, and, among other things, that the defendant desired she should promise not to speak to two certain persons named, and that she refused to make the required promise, was asked on cross-examination by defendant's

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counsel, after having proved that she was a witness on a former trial, if she had not sworn on that former trial that she had told the defendant that these two persons were in the habit of coming to her and the defendant's house at night and mewling like a cat, and that she would go out to them at that signal, and they would have sexual intercourse with her. To this question the prosecuting attorney objected; the court sustained the objection, and the defendant took his bill of exceptions to the ruling; and the ruling is assigned as error.

The objection urged against the admissibility of the testimony was that it was irrelevant, whilst the appellant's counsel insist that the witness should have been permitted to answer the question as tending to discredit her testimony, and that it was admissible evidence to be considered by the jury in mitigation of the punishment, in case the jury should convict. We see no injury that could have resulted to the defendant by excluding the testimony, if the only object was to prove what the witness had testified to on a former trial. We do not see that it was so connected with the subject of inquiry then before the court as to have been of any appreciable value, and it could only have been important as tending to impeach the witness; and for this purpose, even, it was inadmissible. "In general * * * the rule is that upon cross-examination to try the credit of a witness, only general questions can be put; and he cannot be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness." 1 Greenl. on Ev., sect. 455. It is there further said: "But the difficulty lies in determining with precision the materiality and relevancy of the question, when it goes to the character of the witness. There is certainly great force in the argument, that where a man's liberty or his life depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to

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be trusted.” In the present case, however, neither the liberty nor the life of the appellant is at stake, and therefore we are not called on to enlarge the rule as laid down above.

But however this may be in a proper case, we are of opinion the question was altogether improper, and that the witness ought not, and could not legally, have been compelled to answer it, on the ground that the answer would have had a direct tendency to degrade the character of the witness. Whether a witness should be compelled to give testimony having a tendency to degrade his character, or not, seems not to be well settled by authority. Agreeably to Mr. Greenleaf, “the better opinion seems to be, that where the transaction to which the witness is interrogated forms any part of the issue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his character.” 1 Greenl. on Ev., sect. 454. “But,” says the same author, “where the question is not material to the issue, but is collateral and irrelevant, being asked under the license allowed on cross-examination, it stands on another ground. In general, as we have already seen, the rule is, that upon cross-examination to try the credit of a witness, only general questions can be put; and he cannot be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness. The danger of such a practice, it is said, is obvious; besides the inconvenience of trying as many collateral issues as one party might choose to introduce, and which the other could not be prepared to meet. Whenever, therefore, the question put to the witness is plainly of this character, it is easy to perceive that it falls under this rule, and should be excluded.” Greenl. on Ev., sect. 455. The question here put to the witness comes within this category.

In regard to the privilege of witnesses, in not being compelled to answer, it is said the courts will not prevent the witness from answering if he chooses; they will only advise

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him of his right to decline it. "In all cases where the witness, after being advertised of his privilege, chooses to answer, he is bound to answer every thing relating to the transaction. But the privilege is his own, and not that of the party; counsel, therefore, will not be allowed to make the objection. If the witness declines answering, no inference of the truth of the fact is permitted to be drawn from that circumstance. And no answer forced from him after he has claimed protection can afterwards be given in evidence against him." *Id.*, sect. 451. We are of opinion that when the question was asked of the witness, and whilst it was the business of the witness, and not the party, to object, the court, before compelling an answer to the question, should have advised her of her right to decline answering it.

There is still another ground on which the answer to the question was improper. A witness, when by answering a question he may subject himself to a civil action, it seems ought not to be compelled to answer. 1 Greenl. on Ev., sect. 452. To have answered the question put to the witness, as seems to have been anticipated by the interrogator, would have strongly tended to subject her to any of the legal consequences of infidelity to her marriage vows. We are clearly of opinion that, in the circumstances under which the question was asked, the court did not err in sustaining the objection to its being answered.

It is shown by bill of exceptions No. 11, that the court was asked by the defendant to charge the jury, *first*, that in a trial of a party charged with an aggravated assault and battery, the name of the party charged to have been assaulted must be proved as alleged in the indictment or information; *second*, that if the jury believe from the evidence that the party charged to have been assaulted was named Sophira Owen, and not Sofia Owen *alias* Sofia Sandridge, as charged in the information, they ought to acquit the defendant; which the court refused.

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Whether these special instructions were applicable or not must be determined by the averments in the information and the testimony adduced on the trial. As we have already seen, the name of the person on whom the assault is charged is "Sofia Owen, *alias* Sofia Sandridge," and it is the same in the affidavit. As to the testimony, it seems that some of the witnesses, in speaking of Mrs. Owen, called her Christian name Sophira, but the true name of the party charged to have been assaulted seems not to have been elicited in the examination of any witness except Mrs. Owen herself. On the question of her name, she says, at the commencement of her testimony: "My name is Sofia Owen. I am the wife of the defendant; was married to him in Delta County, in December, 1878." On her cross-examination she says, "My name is Sophira Owen;" and on reëxamination she says, "I am called Sofia as much, or more, than Sophira. I am not called Sofia Sandridge in Lamar County; they call me simply Sofia." Another State's witness says: "I am the brother of Sofia Owen, the party charged to have been assaulted; was living with defendant at the time the assault is charged to have been committed." The first witness for the defendant speaks of the "defendant and his wife," but does not mention the names of either. Two other witnesses for the defendant say they were acquainted with "defendant and his wife Sophira;" the fourth and last witness for the defendant, a son of the defendant, speaks once of "Mrs. Owen," but in his testimony no mention of or allusion to her Christian name is made. The evidence seems to be positive that the name of the assaulted party was Sofia, and not Sophira, Owen; the only contradiction of any witness whose attention was called to the subject is the statement of the person in question, who says on her cross-examination that her name is "Sophira Owen," followed by the statement on a reëxamination in which her sole testimony is as above set out, "I am called Sofia as much, or more, than Sophira.

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I am not called Sofia Sandridge in Lamar County; they call me simply Sofia." (Lamar County appears to be the residence of her parents.)

The authorities relied on by the appellant's counsel to support the charge asked, are: 1. *Gorman v. The State*, 42 Texas, 221, where it was held that evidence of an assault on *Mary* Gorman will not support a conviction on an indictment for an assault on *Martha* Gorman. 2. *Roberts v. The State*, 2 Texas Ct. App. 5, where it was held that Lindsay, Lindsey, and Lindsy are *idem sonans*, but are not so with Lindly. 3. *Burgamy v. The State*, 4 Texas Ct. App. 572, where it was held that there was a fatal variance between Abie and Avie. The names were not spelled alike, nor were they *idem sonans*. These cases are not decisive of the question.

The case of *Cotton v. The State*, 4 Texas, 260, and the authorities there cited, appear to be more applicable. There the indictment appears to have mentioned three times the name of the person assaulted: *first*, Francis Hubble; *second*, Francis Hubles; and *third*, Francis Hubbles; but there the several names occurred in the indictment, and not in the proof. Yet we make the following quotation from the opinion, as throwing light on the subject under consideration: "As to the remaining objection to the conviction, the description of the person injured, certainty to a common intent, in this respect, is, it is said, all that the law requires; and if the description be sufficiently explicit to inform the prisoner who are his accusers, the indictment may be supported. 1 Chitty's Cr. Law, 211. If a party be known by one name as well as another, he may be described by either (*id.* 216); as where an indictment for stealing laid the property stolen as belonging to Stephen Harris, and it appeared that the name of the owner was Harrison, but he was sometimes called Harris, it was held to be no variance. *Id.*, note *a*; 1 Overt. 434. If the party here was known by two names, he was well described by

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either.” See the case and the authorities. The court did not err in refusing to give to the jury these charges, nor any others of the several asked by the defendant’s counsel.

This remark is peculiarly applicable to the special charge No. 4, consisting of two clauses, as follows: “ 1. That the husband should be permitted to exercise the right of moderate chastisement upon his wife in cases of great emergency, and to use restraint in cases of misbehavior, without subjecting himself to vexatious prosecutions resulting in the discredit and shame of all parties concerned. 2. If the jury believe from the evidence that Sophira Owen, the party charged to have been assaulted, was at the time of the assault the wife of defendant, and that the assault made by the defendant was made in the manner and for the purposes set forth in charge No. 1, they ought to acquit the defendant.” This may have been common law in England sometime in the past, but it is not now the law either there or here. The other positions on the subject of the rulings of the court on the evidence are wholly untenable.

The court, in the general charge, fully instructed the jury as to the law of the case; and the credibility of the witnesses and the amount of punishment under the law was also properly left by the charge to the jury, where they belong. The court below and the jury must be held competent to settle these questions. The record does not support the charge of drunkenness of a juror. We cannot say, from the record before us, either that the testimony was not sufficient, or that the fine imposed was so excessive as to have required the court below to grant a new trial, or to call upon this court to reverse the judgment; and it is affirmed.

Affirmed.

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FRANK JONES v. THE STATE.

THEFT—PENALTY—CHARGE OF THE COURT.—In a trial for a felony, it is the duty of the judge, whether asked or not, to charge the jury correctly on the penalty prescribed for the offence, as part of the law applicable to the case. It was error fatal to the conviction, in a case of hog-theft, to give as the penalty that which is prescribed for theft in general by arts. 735 and 736 of the Revised Penal Code, instead of that specially prescribed by art. 748, for theft of hogs, sheep, and goats; and the conviction cannot be sustained, though the punishment assessed is one which might lawfully have been assessed under a correct charge of the court.

APPEAL from the District Court of Houston. Tried below before the Hon. W. D. WOOD.

The case is sufficiently stated in the opinion.

W. B. Wall and *J. R. Burnett*, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The provisions of the Penal Code which relate to the punishment for theft generally are the following:—

“Art. 735. Theft of property of the value of twenty dollars, or over, shall be punished by confinement in the penitentiary not less than two nor more than ten years. Art. 736. Theft of property under the value of twenty dollars shall be punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by such imprisonment without fine.”

Whilst these articles relate to and prescribe the punishment in cases of theft generally, both as to property of the value of \$20 or over, as well as to property under the value of \$20, the Code in the next succeeding article (737) declares that the two preceding articles (735 and 736) “do not apply to theft of property from the person,

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nor to cases of theft of any particular kind of property, where the punishment is specially prescribed.”

The judge who presided at the trial of this cause in the court below charged as the penalty agreeably to arts. 735 and 736, and which penalty was by art. 737 declared not to apply to the case, it being a case of theft of a particular kind of property, where the punishment is specially prescribed. The punishment for theft of animals is, in general, specially prescribed by the provisions of the Code, chap. 11, and in art. 748 it is provided that “if any person shall steal any sheep, hog, or goat, he shall, if the value of the property stolen is twenty dollars or over, be punished by confinement in the penitentiary not less than two nor more than five years. If the value of the property is under twenty dollars, he shall be punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by such imprisonment without fine.”

The indictment charges the appellant with the theft of “twelve hogs, of the value of five dollars each.” The jury must have ascertained, in deliberating on the case, that the hogs were of the value of \$20 or over, or they would not have been warranted in rendering a verdict, as they did, assessing his punishment at confinement in the State penitentiary for a term of two years. It may be urged that the charge of the court in the present case worked no injury to the appellant, as the jury assessed an appropriate punishment, and the lowest punishment imposed by law for the theft of property of the value of \$20 or over, and that therefore the appellant has no just grounds of complaint. To this assumption it is sufficient to say that the charge of the court, in so far as it instructed the jury as to the penalty fixed for the offence was not the law of the case, and the grade of offence of which the appellant was convicted being a felony, it became the duty of the presiding

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judge, whether asked or not, to give to the jury a written charge, in which he should have distinctly set forth the law applicable to the case, agreeably to art. 677, Code of Criminal Procedure. *Buford v. The State*, 44 Texas, 525.

We find no other material error requiring special notice; but because of error in the charge of the court in the particular above set out, the judgment is reversed, and the case is ordered to be remanded for a new trial.

Reversed and remanded.

O. CALHOUN v. THE STATE.

THEFT. — In view of the prerogative of juries to weigh the evidence and pass upon the credibility of witnesses, a conviction for theft of a colt is sustained in the present case, notwithstanding that the only State's witness who positively identified the animal was contradicted by several witnesses for the defence, — a suggestive though negative feature of the case being that the defendant made no effort to show what had become of the colt seen in his possession but asserted by him to have been a different one than the colt described in the indictment.

APPEAL from the District Court of Hamilton. Tried below before the Hon. T. L. NUGENT.

The opinion states the case.

Eidson & Pierson and *G. H. Goodson*, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Appellant was tried and convicted for theft of a colt, the property of one John Shipman. The animal was alleged to have been stolen on the fifteenth day of July, A. D. 1878. Defendant was indicted on the 20th of September, 1878, and was tried and convicted September 6, 1879, — a period lacking only a few days of a year from the date of the finding of the indictment to the judgment.

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On the trial, but one witness testified positively that the colt which he saw in defendant's possession was the property of Shipman, or rather that it was the same colt he afterwards saw in possession of and claimed by Shipman. Several witnesses testified that they had seen the colt defendant had in possession, and the one claimed by Shipman, and that they were not the same animals, though very much alike, Shipman's being of lighter color than the one had by defendant.

The defence evidently was based, not upon the theory of mistake, but upon the hypothesis that there were in fact two colts, — one rightfully belonging to defendant, and the other to Shipman. The charge of the court was a very clear and able enunciation of the law applicable to the facts; and with a view specially to the defence relied upon, the jury were instructed in the sixth subdivision: "If you believe from the evidence that the defendant took said colt in good faith, believing he had authority to do so, or if you believe from the evidence that he took some other colt, not the property of John Shipman, or if you have a reasonable doubt as to whether the colt found in his possession (if any) was the property of John Shipman, in either case you will find the defendant not guilty."

It was peculiarly within the province of the jury to judge of the credibility and weight of the testimony, and they have seen fit to believe the testimony of the State's witness. We cannot say that they have erred; for, in addition to the evidence adduced, there is another important circumstance, of a negative character, unaccounted for, and growing directly out of the defence made in the case; and that is, that though twelve months had elapsed from the filing of the indictment to the trial, yet defendant never offered to prove by a single person that the Holloway colt, which he claims was the one in his possession, has ever been seen or heard of since Shipman got the colt alleged to have been stolen. If he was honest in the defence set up, certainly he

Syllabus.

should have shown, to say the least of it, what had become of the Holloway colt. *Gorman v. The State*, 23 Texas, 646.

In so far as a motion for a new trial on the ground of newly discovered evidence is concerned, we think defendant might have discovered the evidence of the witness Thomas by the use of ordinary diligence, he (Thomas) having lived a near neighbor of his for some months after and during the excitement and talk occasioned by the charge of theft of this colt against defendant. The witness Jolly's testimony was only cumulative of evidence already adduced; and we cannot say that the additional testimony of Holloway and Bryson was material, or that it would have affected the result upon another trial. The court did not err in overruling the motion.

Being unable to see any material error committed on the trial, prejudicial to the rights of appellant, the judgment of the court below is affirmed.

Affirmed.

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ELI MAYO v. THE STATE.

1. **INDICTMENT.** — Under the Code of this State, an indictment is good in substance if, eliminating surplusage, it so avers the constituents of the offence as to apprise the defendant of the charge against him, and to enable him to plead the judgment in bar of another prosecution for the same offence. That which it is not necessary to prove need not be alleged in an indictment.
2. **SAME — MISNOMER.** — If a misnomer occurs in an allegation which is immaterial and may be rejected as surplusage, it does not vitiate the indictment.
3. **RAPE.** — Sexual intercourse with a female under the age of ten is rape in this State, no matter what the circumstances; and the question of consent, or whether the intercourse was obtained by force, threats, or fraud, is wholly immaterial.
4. **CASE STATED.** — Indictment of one Eli Mayo for rape of a female under ten years of age alleged that he, the said Eli Mayo, did make an assault, etc., and that he, by force, threats, and fraud "by him, the said Eli May," used, etc., and without her consent, did ravish, etc. Defendant moved to quash for the reason, substantially, that the rape was not charged against him.

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Argument for the appellant.

but against a different man, to wit, Eli May. But *held*, that the allegation excepted to is immaterial and surplusage, and the indictment, eliminating that allegation, remains sufficient to charge the defendant with rape of a female under ten years of age.

5. **ATTEMPT TO COMMIT RAPE.** — Under the Code of this State, the offence of an attempt to commit rape on a female under ten years of age may be perpetrated with her consent, and without force, threats, or fraud.
6. **EVIDENCE.** — In a trial for rape, the prosecutrix cannot be required to testify to illicit intercourse between herself and any one other than the defendant.
7. **PRACTICE.** — Art. 729 of the Revised Code of Criminal Procedure introduces a new rule of practice by providing that the judge, in ruling upon the admissibility of evidence, shall not comment on its weight or bearing, but simply pass on its admissibility. Under this rule, it seems that objections to evidence which are not assigned at the time should be considered waived.

APPEAL from the District Court of Houston. Tried below before the Hon. W. D. Wood.

All material facts appear in the opinion.

Moore & Burnett, for the appellant. Under the charge of the court the jury were told that the defendant could be convicted of an attempt to commit rape if he merely attempted the act, and the girl was at the time under the age of ten years, although she may have consented to the attempt, and although there was neither force, threats, nor fraud. Is this law? “Every offence includes within it an attempt to commit the offence, when such attempt is made penal by law.” Code Cr. Proc., art. 714. The only article of the Penal Code authorizing a conviction for an attempt to commit rape is art. 635, as follows: “If it appears on the trial of an indictment for rape that the offence, though not committed, was attempted by the use of any of the means spoken of in arts. 529, 530, and 531, but not such as to bring the offence within the definition of an assault with intent to commit rape, the jury may find the defendant guilty of an attempt to commit the offence, and affix the punishment prescribed in art. 503.”

By this article a conviction for this offence is limited to cases where the attempt was made by the use of force as

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defined in art. 530, or of fraud as defined in art. 531. While it is clear that actual carnal knowledge of a girl under ten years of age is rape whether she consents or not, it seems equally clear that a mere attempt, without force, threats, or fraud, to have carnal knowledge, with her consent, is no offence by law. We do not argue that the defendant could not be convicted of an attempt to commit rape, if the girl was under the age of ten years, because she may have consented; it is probable the consent of a child under such age would not, under the law, excuse an attempt to have carnal knowledge of her. But, conceding this proposition, we do respectfully urge that while consent may be immaterial in such case, yet to constitute the offence of an attempt to commit rape, one of the prime elements of *force, threats, or fraud* must be proved. Art. 535, Penal Code; *Curry v. The State*, 4 Texas Ct. App. 599; *Thompson v. The State*, 43 Texas, 684. The charge of the court fails to define the offence of an attempt to commit rape; nowhere in the charge is it stated that force, threats, or fraud is essential to constitute such offence; and it is, we submit, quite evident that the jury, in acquitting defendant of rape, and of assault with intent to commit rape, did not find that he used any force, and on the above quoted paragraph of the charge, which made the *mere attempt*, without any force, and with or without her consent, a felony, found him guilty of an attempt to commit rape.

The error in the charge is fundamental, and, we think, clearly entitles the defendant to a reversal of the judgment.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Under an indictment for rape upon a female child of the age of eight years, this appellant was found guilty of an attempt to commit rape (Rev. Stats., Penal Code, art. 535), and his punishment assessed at two years' confinement in the penitentiary. Rev. Penal Code, art. 503.

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A motion was made to quash the indictment, which was overruled, and this action is one of the chief errors complained of. In order to make the question understood, we reproduce a portion of the indictment, which is as follows, after the usual formal portions: “that Eli Mayo, on the thirtieth day of July, in the year of our Lord one thousand eight hundred and seventy-four, in the county of Houston aforesaid, in and upon one Ella Gann, a female then and there being of the age of eight years, unlawfully, feloniously, and wilfully an assault did make; and that the said Eli Mayo, then and there being an adult male, and over the age of fourteen years, did then and there unlawfully, wilfully, and feloniously, *and by force, threats, and fraud, then and there by him, the said Eli May, used and practised upon the said female, Ella Gann, and without the consent then and there of the said Ella Gann,* ravish and have carnal knowledge of the said female, Ella Gann, by then and there having sexual intercourse with her, the said Ella Gann; against the peace and dignity of the State.” We have italicized the portion of the indictment which we propose to discuss in connection with the motion to quash.

The special ground upon which the motion was based is thus stated in the motion, viz.: “that said pretended indictment alleges that Eli Mayo committed a rape upon Ella Gann, and that *Eli May* used the force, threats, and fraud,” etc. In other words, it is contended that defendant, Eli Mayo, is charged with making the assault, whilst Eli May, another and different person, is charged with the actual perpetration of the rape.

As here presented, the question is not one of misnomer only (*Foster v. The State*, 1 Texas Ct. App. 531), nor of misnomer wherein the indictment might be corrected (Rev. Stats., Code Cr. Proc., arts 513, 514); but the objection, if a valid one, goes to the substance and sufficiency of the indictment. It is necessary, then, to determine if the objection is a valid one. To do this we must consult the

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known and well-established rules of criminal pleading and construction. A rule almost fundamental is that no allegation, whether it be necessary or unnecessary, or more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage. 1 Bishop's Cr. Proc., sect. 485; *Warrington v. The State*, 1 Texas Ct. App. 168. But allegations not essential to constitute the offence, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are treated as mere surplusage, and may be entirely disregarded. *United States v. Howard*, 3 Sumn. 12. And where an indictment contains matter unnecessary to a description of the offence, it may be rejected. *The State v. Coppenburg*, 2 Strobb. 273. Again, if, eliminating surplusage, an indictment so avers the constituents of the offence as to apprise the defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution, it is good in substance under our Code. *Coleman v. The State*, 2 Texas Ct. App. 512; *Burke v. The State*, 5 Texas Ct. App. 74. A variance in the name in an indictment will not be fatal if the name be immaterial to constitute the offence and may be rejected as surplusage. 2 East P C. 593; Roscoe's Cr. Ev. 82. If the name of a person be mistaken in an indictment, and the allegation in which the misnomer occurs be immaterial, so that it may be rejected as surplusage, it will not vitiate the indictment. *The Commonwealth v. Hunt*, 4 Pick. 252; *United States v. Howard*, 3 Sumn. 12.

Now to apply these rules to the case we are considering. As we have seen, the indictment is for rape committed upon the person of a female child under the age of ten years. Mr. Bishop says: "These are English statutes, the early ones — as 18 Eliz., c. 7, sect. 4 — being probably common law in this country, making the carnal knowledge of female children under ten years, though consenting, felony. * * *

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Thus, though we have almost no direct decisions to guide us, yet, according to established principles, the common law of this country makes the unlawful carnal knowledge of a girl who consents while between ten and twelve years old indictable as a misdemeanor; below ten, indictable as a felony. The whole subject has been regulated by legislation in many, perhaps all, of the States." 2 Bishop's Cr. Law (5th ed.), sect. 1133.

In our own statute, rape is defined to be "the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud; or the carnal knowledge of a female under the age of ten years, with or without consent, and with or without the use of force, threats, or fraud." Rev. Stats., Penal Code, art. 528. Sexual intercourse with a female under the age of ten years is rape, no matter what the circumstances; and the question of consent, whether obtained by force, threats, or fraud, is wholly immaterial. *Anschicks v. The State*, 6 Texas Ct. App. 525. If the offence is complete when committed upon a female under ten, "with or without her consent, and with or without the use of force, threats, or fraud," then it follows that none of those elements of the crime are required to be proven, and that it is in such case unnecessary to allege either of those facts in the indictment; that is, to negative the consent, or aver the means used to accomplish the crime, because "that which it is not necessary to prove need not be stated in the indictment." Rev. Code Cr. Proc., art. 421.

When we consult standard precedents for indictments of this character, we will find that the prescribed forms do not contain such allegations. See 1 Whart. Prec. of Indict. 189, 190. Mr. Bishop, in his Criminal Procedure, vol. 1, sect. 481, discusses this very question, and cites authorities in support of the position above taken by us, one of the cases cited being identical.

Looking now to the indictment as copied herein above, we find that, if all that portion which we have italicized be

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treated as surplusage and stricken out, the indictment as eliminated will be amply sufficient to charge the offence. If they are immaterial and unnecessary, then, as we have seen, they may be treated as surplusage and rejected, and should be. With this unnecessary portion rejected as surplusage, the motion to quash was without substantial foundation, and the court therefore did not err in overruling it.

It is contended in the ingenious brief of counsel that the defendant could not be found guilty of an attempt to commit rape under the circumstances of this case, and that the charge of the court upon this aspect of the case was erroneous. The charge complained of is in the following language: "If you have a reasonable doubt as to whether the defendant penetrated Ella Gann, as before stated in this charge, in such case if you believe beyond a reasonable doubt the said Ella was under the age of ten years, and you further find that the defendant attempted to have carnal intercourse with the said Ella, whether you find she consented to such attempt or not, then and in such case, if you so find from the evidence beyond a reasonable doubt that defendant made such attempt, the defendant is in law guilty of an attempt to commit rape." It is said by counsel: "While it is clear that actual carnal knowledge of a girl under ten years of age is rape, whether she consents or not, it seems equally clear that a mere attempt, without force, threats, or fraud, to have such carnal knowledge, with her consent, is no offence defined by law, — that while consent may be immaterial in such case, yet to constitute the offence of an attempt to commit rape one of the prime elements of *force, threats, or fraud* must be proved." Citing Penal Code, art. 535; *Thompson v. The State*, 43 Texas, 584; *Curry v. The State*, 4 Texas Ct. App. 579.

The answer to this position is that the law makes carnal intercourse of a female under ten years *ipso facto* rape, — the tender years of the female stand in lieu of and supply all that would be requisite to allege and prove in other cases.

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Now, if the party can be convicted and punished where he has accomplished his purpose, is it not, *à fortiori*, absurd to say he cannot be punished under similar circumstances for attempting to perpetrate the crime? The law says it is not necessary that force, fraud, or threats shall be used on a female under ten, in ravishing her, and if she consents it is rape nevertheless. And so in the attempt; she may consent, and yet the attempt is an act of force and fraud, because she is incapable of consent; and to take advantage of her consent is both force and fraud in contemplation of law.

The court did not err in refusing the special instruction asked by defendant's counsel.

In so far as it is complained that the court erred in its rulings upon the evidence offered by the defendant and excluded, as shown by the bill of exceptions, the explanation made by the judge for the reasons of his action is entirely satisfactory. In prosecutions for rape, the prosecutrix cannot be interrogated as to criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible. 6 Greenl. on Ev., sect. 214; *Pefferling v. The State*, 40 Texas, 492; *Dorsey v. The State*, 1 Texas Ct. App. 33; *Jenkins v. The State*, 1 Texas Ct. App. 346. As to this evidence a further explanation of the bill of exceptions is made by the court, as follows: "The court understood from defendant's counsel, on the trial, that their object in the introduction of evidence as to acts of incontinence by Ella Gann with men other than defendant, both before and after the alleged commission of the offence charged upon defendant, was for the purpose of impeaching her general character for chastity. They insisted earnestly that the evidence was admissible for the purpose, and the court ruled with this understanding. They now say and insist that there was another object, which was to show that the injury, if any, inflicted on the private parts of Ella Gann was the result of such connection with other per-

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sons, or that it would be a circumstance to negative the idea that such injury was caused by defendant." We are of opinion that the court did not err.

This explanation of the judge induces us to call attention to a new rule of practice incorporated into the Revised Code of Procedure, viz. : " In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same, or its bearing in the case, but shall simply decide whether or not it be admissible." Art. 729. Inasmuch as the judge cannot discuss or comment upon the proposed evidence, but must simply decide upon the objections made to it, it seems fair to infer that all objections intended to be relied on must be clearly stated, so that he may act in reference to all, and that a failure to assert any objection would be tantamount to a waiver of all objections not affirmatively presented.

We have been unable to discover any such error in this record as requires a reversal, and the judgment is therefore affirmed.

Affirmed.

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T. R. JENNINGS v. THE STATE.

1. **MURDER.** — Between the elements and definition of murder at common law and of murder under the Penal Code of this State there is no material difference, and therefore common-law indictments for that offence have always been held by our courts to be sufficient in substance.
2. **MANSLAUGHTER** under the Code of this State differs materially in its elements, definition, and penalty from that offence at common law, by which, although a felony, its punishment, under the operation of the benefit of clergy, was practically reduced to that of a misdemeanor. At common law it was defined as the unlawful and felonious killing of another, without malice express or implied; whereas our Code defines it as "voluntary homicide, committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." One consequence of these differences is that a common-law indictment for manslaughter is not sufficient to charge that offence in this State. See the opinion in elucidation and the indictment in illustration of this subject.

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2. PLEADING. — The Code of this State requires that an indictment shall set forth the offence “in plain and intelligible words;” and this requirement is not satisfied by an indictment, such as a common-law indictment for manslaughter, from which no offence against the law of this State can be deduced except by a process of inference and elimination.

APPEAL from the District Court of Nacogdoches. Tried below before the Hon. R. S. WALKER.

The charging part of the indictment was as follows: “That Thomas R. Jennings, on the 24th day of November, A. D. 1875, with force and arms, in the county of Nacogdoches aforesaid, with a certain pistol, which the said Thomas R. Jennings in his hands then and there had and held, which said pistol was then and there loaded with gunpowder and leaden balls, in and upon Hulen H. Crain, in the peace of God and the said State then and there being, unlawfully, wilfully, and feloniously an assault did make, and that the said Thomas R. Jennings did then and there unlawfully, wilfully, and feloniously shoot off and discharge out of and from the pistol aforesaid the leaden balls aforesaid, by force of the gunpowder aforesaid, to, at, against, upon, and into the body of him, the said Hulen H. Crain, and that the said Thomas R. Jennings did then and there, with the leaden balls aforesaid, so by him shot off and discharged out of and from the pistol aforesaid, unlawfully, wilfully, and feloniously strike, penetrate, and wound him, the said Hulen H. Crain, then and there and thereby inflicting upon the right side of him, the said Hulen H. Crain, about six inches below the right armpit of him, the said Hulen H. Crain, one mortal wound of the depth of six inches and of the width of one inch, and of which said mortal wound the said Hulen H. Crain, on the 27th day of November, A. D. 1875, in the county of Nacogdoches aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say and present to the said court that the said Thomas R. Jennings, in manner and form as aforesaid, did then and there unlawfully, wilfully, and feloniously kill and slay him, the

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said Hulen H. Crain ; against the peace and dignity of the State.”

The defence moved to quash the indictment: “ 1. Because said indictment does not charge manslaughter as defined in the Criminal Code ; said indictment does not charge that the alleged homicide was voluntary, and committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law. 2. Because said indictment does not charge any malice. 3. Because it is vague, uncertain, and indefinite, neither charging murder nor manslaughter. 4. Because it does not charge any offence known to the law.” The motion to quash was overruled.

The case having proceeded to trial, the jury found the appellant guilty of manslaughter, and assessed his punishment at three years' confinement in the penitentiary. He moved for a new trial on various grounds, and also in arrest of judgment, assigning “ that it does not appear from the face of the indictment filed in this cause that any offence against the law has been committed by the defendant ; that it does not appear from the face of the indictment that any such offence as the one for which defendant has been convicted was committed by the defendant.” These motions being overruled, he prosecutes his appeal.

The testimony was voluminous, and there is no occasion to narrate it. Both the deceased and the defendant, it appears by some of the witnesses, were drunk, and engaged in a sudden and violent quarrel, culminating in menacing gestures and a blow struck the defendant by the deceased, and the immediate shooting of the deceased by the defendant. Deceased habitually carried arms, and, when drinking, was deemed a dangerous man, and appellant had cause to believe him armed at the time.

Wellborn, Leake & Henry, J. H. Jones and G. F. Ingraham, for the appellant.

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Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. Murder at common law is defined as follows : "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." 3 Inst. 47 ; 47 Bla. Comm. 195 ; 1 Hale's P. C. 425. Our legislative definition of that offence has generally conformed substantially to the definition above given, and for many years has been almost its literal counterpart. The act of December 21, 1836, contained the following definition : "Every person of sound memory and discretion, who shall wilfully and maliciously kill any person within this Republic, or shall aid, abet, or instigate the killing of any person aforesaid, shall be deemed guilty of murder, and on conviction thereof shall suffer death." Hart. Dig., art. 2509.

Our present statute, adopted in 1858, is in similar terms, but perhaps more nearly approximating the language employed at common law : "Every person with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being, within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder." Rev. Penal Code, art. 605. From these provisions it appears beyond question that our legislation, during our whole existence as a Republic and a State, has never attempted to change the essential elements of murder as it existed at common law, but has continued the common-law offence, through all the mutations of government and legislation, substantially as it existed in the days in which Coke and Blackstone wrote, and long anterior thereto.

The sufficiency of an indictment in the common-law form, under our practice, was brought to the attention of our Supreme Court at an early day, in the leading case of *Gehrke v. The State*, 13 Texas, 568, and it was insisted that

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the statutory separation of the offence into two degrees, and prescribing "that all murder committed by poison, starving, or torture, or other premeditated or deliberate killing, * * * is murder in the first degree," required the pleader, in framing an indictment for murder in that degree, to employ certain statutory words in addition to those employed at common law in charging the offence. But the court held, under well-established authorities, that our statutes did not change the common-law definition of the offence, and that therefore an indictment in the common-law form contained every substantial requisite. This decision has been followed uniformly ever since. *White v. The State*, 16 Texas, 206; *Wall v. The State*, 18 Texas, 682; *Perry v. The State*, 44 Texas, 473.

An examination of the definition of manslaughter at common law and under our statute does not reveal that similarity which pertains to the offence of murder under the two systems. At common law, manslaughter is defined as "the unlawful and felonious killing of another, without any malice, either express or implied." 4 Bla. Comm. 191; Whart. on Hom., sect. 4. It consisted of two different kinds or degrees, to wit: *first*, voluntary manslaughter, which is somewhat similar to manslaughter under our law; and, *second*, involuntary manslaughter, which corresponds to our offence of negligent homicide. The crime was a felony, but with benefit of clergy, and the indictments for the two degrees were essentially different. 4 Bla. Comm. 193; 1 Whart. Prec. of Indict., sects. 167, 170.

In the adoption of our Penal Code, the Legislature carved out of the common-law offence two distinct crimes, and gave to manslaughter, not the common-law definition, but a definition hitherto unknown to the law, which fixed the *status* and elements of the offence with a distinctness that forbids confounding it with the offence at common law. It was declared to be "voluntary homicide, committed under the immediate influence of sudden passion arising from an

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adequate cause, but neither justified nor excused by law" (Penal Code, art. 593), and not the killing of another without premeditated malice, as declared by a former statute. Hart. Dig., art. 2405. Not only did it affix to the offence an entirely new definition, but it gave to it distinct ingredients, and increased the punishment over what it was at common law, by making it a felony with a maximum and minimum penalty, benefit of clergy never having been known to our law. Though a felony at common law, benefit of clergy practically reduced its punishment to the grade of a misdemeanor with us.

These general views are important to be borne in mind in arriving at a proper solution of the most material question presented for our decision in this case, and that is the sufficiency of the indictment upon which the appellant was convicted. This indictment is in the common-law form for manslaughter, and charges, with the usual accompanying allegations, that appellant did unlawfully, wilfully, and feloniously kill the deceased, but does not charge that it was done with malice.

In an able review of the *Gehrke Case*, Judge Wheeler took occasion to reëxamine the question of the sufficiency of a common-law indictment for murder in our State, and, after an elaborate review of the authorities of other States, reached the same conclusion before arrived at and announced by the court. After quoting from *The People v. Enoch*, 13 Wend. 159, wherein the judgment of the Supreme Court of that State was affirmed, and in which the general principle applicable to all indictments founded upon statutes, that it was necessary to set forth all the facts and circumstances which constituted the offence as defined in the statute, was conceded, he proceeds to say: "The same principle applies where an offence at common law has been raised by statute by increasing the punishment, as where the benefit of clergy has been taken away, or a misdemeanor has been raised to a felony. But the application of this

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principle to the case is not admitted, for the statute has not altered the common law. The offence of murder, as defined in the statute, was such before the statute. There is no new offence created by the statute, nor a new punishment annexed to an old offence. The case, therefore, does not fall within the rule, nor the reason of the rule, supposed to be violated by the form of the indictment.” *Wall v. The State*, 18 Texas, 695.

And in the case of *The People v. Enoch* the principle is stated as follows: “In determining the question whether an indictment should be drawn as at the common law, or should appear to be founded upon a statutory provision which is applicable to the offence, the following rules are to be observed: If the statute creates an offence, or declares a common-law offence, when committed under particular circumstances not necessarily included in the original offence, punishable in a different manner from what it would have been without such circumstances; or where the statute changes the nature of the common-law offence to one of a higher degree, as where what was originally a misdemeanor is made a felony, the indictment should be drawn in reference to the provisions of the statute creating or changing the nature of the offence.” 13 Wend. 173.

See also *The State v. Gove*, 34 N. H. 510. Mr. Bishop, in his valuable work on Statutory Crimes, says, “that if a statute in general terms provides a punishment for ‘murder’ or for ‘manslaughter,’ it means murder or manslaughter as the offence is defined at the common law. Then, in the absence of any statutory provision, the indictment should be drawn precisely as at the common law. If it is in a State in which there are no common-law offences, or if the offence is against the United States, it should also conclude against the form of the statute.” Bishop’s Stat. Cr., sect. 469. And the same author, in treating of indictments for statutory homicide, says: “It is a leading proposition, in these as in all other cases of indictments upon statutes,

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that the pleading must follow, in substance, the statutory language." 2 Bishop's Cr. Proc., sect. 614. The only State in which a different rule seems to obtain is Ohio, so far as our researches have extended; but although the common law, as to offences, does not prevail in that State, its statute defines manslaughter similarly to its definition at common law, and, as said by their Supreme Court, the Legislature adopted the common-law definition in substance, and almost in form. *Sutcliffe v. The State*, 18 Ohio, 469.

It is thus seen that the rule upon which our decisions as to the sufficiency of indictments in the common-law form for murder are founded cannot apply to indictments for manslaughter. In the case of murder, the statute does not vary from the common-law definition; and in such case the authorities, so far as we have been able to discover, are uniform to the effect that the common-law indictment fills the full measure of the statute in charging the offence. But in manslaughter, the departure from the common law is most material in more than one essential particular. Not only is the penalty different, but the offence itself is carved out of the common-law offence, leaving a residuum which is provided for by our laws in a separate and different statute and designated by a different name. An indictment which charges the defendant with having unlawfully, wilfully, and feloniously killed another, cannot convey unmistakably to his mind the important and essential information that the State proposes to arraign and try him for having voluntarily slain a fellow-being under the immediate influence of sudden passion, arising from an adequate cause but neither justified nor excused by law. He may infer, because he is not charged to have done the act "with malice aforethought," that his prosecution is not for murder; and casting about in an effort to locate the exact crime, he may further infer, from the fact that he is charged with felonious killing, that the offence cannot be negligent homicide in either degree. And by the same mental process he may be

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enabled to discard the degrees of justifiable and excusable homicide, and find that the only grade of homicide remaining is manslaughter, and therefore that must be the offence with which the pleader designed to charge him. Such an indictment does not fill the measure of our law, which requires an offence to be stated in plain and intelligible words; and we would be doing violence to the letter and spirit of our Codes, as well as disregarding the reason of the law, founded upon authority, should we hold any indictment of this character sufficient to justify the arraignment and conviction of the citizen.

The exceptions of defendant to the indictment, as well as his motion in arrest of judgment, should have been sustained. And the indictment being invalid, there is no occasion to discuss the question of former jeopardy raised upon the trial.

The charge of the court is not free from objection, and in case of another trial should be qualified. The charge submits to the jury the principles of law applicable to self-defence upon a reasonable apprehension and appearance of danger, but so qualifies it with repeated preceding instructions as to the necessity of absolute danger before a person is justified in exercising the right of self-defence, that we cannot say the jury were authorized or likely to give the proper weight to that part of the charge, in view of the qualification.

The charge also dwelt at length upon the law as applicable to a combat voluntarily and mutually engaged in between parties, with deadly weapons, — an issue that it might have been proper to refer to, but not sufficiently patent from the evidence to justify the prominence given to it. Its frequent repetition and elaboration throughout the charge was calculated to cause the jury to forget or ignore the true issue; and that was, whether or not, at the crisis of the difficulty, which arose upon a sudden quarrel, the defendant, from the character and habits of the deceased and

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his acts at the time, had a reasonable expectation or fear of immediate death or serious bodily injury at the hands of the deceased, and were those facts and circumstances sufficient to justify such apprehension; or was the fatal shot prompted by sudden anger, rage, or resentment, arising from an adequate cause, but neither justified nor excused by the law. The defendant was entitled to have this issue plainly presented to the consideration of the jury, in such form that their minds could readily grasp the issue and solve it without being compelled to extract and sift it from the very able and elaborate charge given them, — a task for which the mind of the average juror is never competent.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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R. DEGGS, *alias* BROWN, v. THE STATE.

1. **VENUE.** — The doctrine of reasonable doubt does not apply to the venue of the offence, nor is positive testimony indispensable to the proof of that fact. It suffices if, from the facts in evidence, and which appear affirmatively in contradistinction to inference, the jury may reasonably conclude that the offence was committed in the county alleged. *Higbee v. The State*, 2 Texas Ct. App. 407, explained.
2. **ANIMALS** on their accustomed range are in the possession of their owner.
3. **CHARGE OF THE COURT.** — When *alibi* is relied on in defence, its nature and character should be explained to the jury.
4. **PRACTICE.** — One purpose of the requirement that the judge must approve the statement of facts is to enable him to supply any facts omitted by counsel.

APPEAL from the District Court of Falls. Tried below before the Hon. L. C. ALEXANDER.

The indictment and conviction were for theft of two oxen, and two years' confinement in the penitentiary was the punishment awarded.

Opinion of the court.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. It is assigned for error that the court erred in directing the jury that "venue, or the place of committing an offence as alleged, may be shown by such facts and circumstances as show beyond a reasonable doubt the locality or county." If there be any error in this instruction, it was to the prejudice of the prosecution, and beneficial to the prisoner. The reasonable doubt does not apply to the merely jurisdictional fact of venue. *Barara v. The State*, 42 Texas, 260; *McReynolds v. The State*, 4 Texas Ct. App. 320. And it is not essential that venue be established by positive testimony, but only that from the facts in evidence, and which appear affirmatively and in contradistinction to mere inference, the jury may reasonably conclude that the offence was committed in the county alleged. In *Higbee v. The State*, 2 Texas Ct. App. 407, it was said that "positive affirmative proof of venue must be made, and not only made, but be shown by the record." The character of proof necessary to support the allegation of venue was not before the court in that case, but only the fact that in the record sent up to this court there was an entire absence of any proof as to the venue. And by the language employed it was not intended to hold that such proof must be positive, according to its legal signification, but only that the venue must not be left to mere inference, either in the lower court or in this court.

The other errors assigned are not deemed of sufficient importance to justify discussion. The evidence shows conclusively that the animals alleged to have been stolen were taken from their accustomed range; and at this day it can hardly be seriously questioned that animals upon the range are, in legal contemplation, in the possession of their owner, or that in this particular case a charge to that effect was inapplicable to the case.

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An *alibi* having been set up as the sole defence, it was not only competent but proper for the court to explain to the jury its nature and character, which was done in a clear and perspicuous manner; and a purpose of the law in requiring that the statement of facts should be approved by the judge, was to enable that officer to supply omissions which had been made by counsel, either through accident or design, and which were essential to a proper presentation of the case on appeal.

The judgment is affirmed.

Affirmed.

W. SCALES v. THE STATE.

1. **THEFT — PRINCIPAL OFFENDERS — CHARGE OF THE COURT.** — Defendant was separately indicted and tried in W. County as a principal offender in the theft of certain horses. The proof was, that in pursuance of an agreement made in C. County by the defendant and certain confederates, he remained in C. County while they went to W. County, stole the horses, brought them to C. County, where they were joined by the defendant, and the party took the animals to the Panhandle of Texas, and were there captured. On this state of proof the court below refused to instruct for acquittal if the jury believed the defendant guilty as an accomplice or accessory; and charged, in effect, that if the parties acted together in the theft, pursuant to a common intent and previously formed design, all were principals, whether all were or were not personally present when the theft was committed. *Held*, correct, and in accord with former rulings of this court.
2. **INDICTMENT.** — By the recital that "the grand jurors of the State of Texas, duly empanelled, charged, and sworn to inquire of offences committed in the county of W., upon their oath do present in the District Court of said county," etc., an indictment shows on its face that it is the act of a grand jury of the county therein named.

APPEAL from the District Court of Wise. Tried below before the Hon. J. A. HOOD.

The case is sufficiently disclosed in the opinion and head-notes. Appellant was allotted fifteen years in the penitentiary.

Opinion of the court.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The evidence disclosed that the animals alleged to have been stolen were taken in the county of Wise by two confederates of the appellant, and under his direction, and that, after they were taken to the county of Clay, appellant joined the party and went with them to the Panhandle country, where they were soon afterwards captured with their booty, the appellant being found, at the time of the capture, upon one of the stolen horses, and lending his active assistance in furthering the joint enterprise. At the time of the actual perpetration of the theft, appellant was in Clay County, and the four participants, appellant and three others, were partners in the enterprise, under an arrangement to share the profits equally. The court refused an instruction asked by defendant to the effect that, if the jury should find that the defendant was only guilty as an accomplice or accessory, they should acquit, he being indicted as a principal; and in its stead the court instructed the jury as follows: —

“All persons are principals who are guilty of acting together in the commission of an offence, and principals, whether jointly indicted or not, may be legally prosecuted and convicted as such, provided the evidence adduced against each clearly and satisfactorily establishes the guilt of each. Where an offence has been committed, the true criterion for determining who are principals is, ‘Did the parties act together in the commission of the offence? Was the act committed in pursuance of a common intent, and in pursuance of a previously formed design in which the minds of all united and concurred?’ If so, then the law is that all are alike guilty, provided the offence was actually committed during the existence and in execution of the common design and intent of all, whether in point of fact

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all were actually bodily present on the ground where the offence actually took place, or not.”

This instruction very clearly presented the law applicable to the case, and is in accord with the previous decisions of this court. *Welsh v. The State*, 3 Texas Ct. App. 413.

No substantial defect is perceived in the indictment. While it may be subject to grammatical criticism as to the proper arrangement of its terms, yet the offence is set forth in plain and intelligible words, and contains all essential ingredients. The failure to designate the grand jurors as of the county of Wise, as well as of the State of Texas, is immaterial, it being alleged that they were empanelled, charged, and sworn to inquire of offences committed in the county of Wise, and make their presentment in the District Court of that county. *Coker v. The State*, decided at the present term, *ante*, p. 83.

The evidence fully supports the verdict, and the judgment is affirmed.

Affirmed.

JOE JACKSON v. THE STATE.

1. **CONFESSIONS** made in arrest are not admissible in evidence unless it be shown that they were voluntarily made by the prisoner after he had been properly cautioned that his statements might be used against him.
2. **THEFT — EVIDENCE — CHARGE OF THE COURT.** — If, in a trial for theft, the proof shows that the property was taken from the possession of a person holding the same for the owner, it is incumbent on the State to show the want of that person's consent to the taking of the property; and this proof should be made by that person himself, or his absence be accounted for, before resort had to circumstantial evidence to show the want of his consent. The jury should be instructed that such evidence is necessary, in the state of case indicated, to warrant a verdict of guilty.
3. **CHARGE OF THE COURT.** — The jury should not be so instructed as to warrant them arbitrarily to select what evidence they will believe. The charge should leave them free, as the law does, to determine the facts by their own mode of reasoning upon the evidence.

Opinion of the court.

APPEAL from the District Court of Kaufman. Tried below before the Hon. G. J. CLARK.

The opinion sufficiently indicates the case.

Grubbs & Morrow, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The testimony of the witness Snow was improperly admitted against the defendant in the court below, over objection by the defendant's counsel, for the reason that it is made to appear that the defendant was under arrest and in restraint, and it not appearing that the admissions of the defendant to the witness were voluntarily made after the defendant had been properly cautioned that his statements might be used against him on his trial. Code Cr. Proc., art. 750.

The court was asked to charge the jury to the effect that want of consent both of the owner and of the party holding the horse for him was necessary proof on the part of the State, in order to authorize a verdict of guilty against the defendant. It was in proof that the owner had left the animal charged to have been stolen in the possession and control of one Price. One part of the definition of the crime of theft is that the property was taken from the possession of the owner, or *from the possession of some person holding the same for him*. Penal Code, art. 724. It was important that it be shown that the person who was shown to have had the actual possession of the animal had not given his consent to the taking, and that the jury should have been so instructed. The testimony of this witness should have been produced, or his absence accounted for, before resorting to circumstantial testimony to establish the want of his consent. *Erskine v. The State*, 1 Texas Ct. App. 405.

The court in its general charge instructed the jury as

Syllabus.

follows: "When there is a conflict in the evidence, it is the duty of the jury to reconcile it, if it can be done; but if the evidence cannot be reconciled, then it is for the jury, after considering and carefully weighing all the facts and circumstances in proof before them, to give credit to such witnesses or set of witnesses as appear to the jury most worthy of belief." This charge was erroneous, because it allowed the jury arbitrarily to believe or disbelieve any witness or set of witnesses. Matters of this nature should be left by the charge of the court just where the law places them. It is the duty of the judge to state plainly the law of the case, and he is not permitted to discuss the facts or use any argument in his charge calculated to arouse the sympathies or excite the passion of a jury. Code Cr. Proc., art. 678. The jury are the exclusive judges of the facts in every criminal cause (art. 676); and they should not be further instructed by the court, as they are more likely to reach a correct conclusion by their own modes of reasoning than by any further rules given them by the court.

These errors were properly saved at the trial, and are sufficiently set out in the transcript to require their consideration; and for these errors the judgment must be reversed and the case remanded.

Reversed and remanded.

EX PARTE J. W. AND T. B. JONES.

HABEAS CORPUS—RIGHT OF APPEAL.—On a charge of murder against the appellants, an examining court committed them to jail without privilege of bail; whereupon they sued out *habeas corpus* before a district judge, who remanded them to jail without bail, and they appealed from his judgment to this court, and filed the transcript in this court at its Austin term, 1879. At a subsequent day of the same term they moved the court to enter an order dismissing their appeal, and allowing them to withdraw the transcript; which motion the court granted on the same day. At the ensuing

Statement of the case.

term of this court, at Tyler, they filed a transcript there, and claimed a right to a hearing and determination of their appeal upon its merits. The assistant attorney-general filed a motion to dismiss the cause, whereby the foregoing matters were set forth, and the court further informed that since the appeal was first taken an indictment for murder in the first degree had been duly found against the appellants, and assigning as cause for dismissal their abandonment of their appeal at the Austin term, and the finding of the said indictment. *Held*, that the motion to dismiss must prevail, inasmuch as the appellants have heretofore exercised and exhausted their right of appeal, and no authority of law being shown or known to a second appeal from the same judgment.

HABEAS CORPUS on appeal from a judgment in chambers, rendered by the Hon. S. FORD, Judge of the Ninth Judicial District.

The offence alleged against the appellants and one James Stearnes was the murder of George T. Morse, in Robertson County, on March 25, 1879. All three of the parties charged were refused bail by the justice of the peace who held the examining court, but, on the hearing of their *habeas corpus* by Judge Ford, bail was allowed Stearnes in the sum of \$3,000; and the others being remanded without bail, they appealed.

In the opinion, and the motion of the assistant attorney-general, will be found all other matters of fact having any relevancy to the disposition made of the case by this court.

The motion of the assistant attorney-general was as follows:—

“Now comes the State, by attorney, and represents to the court that in the spring of 1879 the appellants, by a justice of the peace, were committed without bail. Subsequent to the commitment, a writ of *habeas corpus* was sued out, and on its return a hearing begun on the — day of April, 1879, before the Hon. Spencer Ford, judge of the Ninth Judicial District of Texas, when bail was again denied the appellants. From this an appeal was taken to the Austin branch of this court. On the 31st of May, 1879, appellants filed a motion in the Court of Appeals to dismiss

Argument for the State.

their appeal, and on the same day the motion was granted and the appeal dismissed. All of which will more fully appear by reference to the papers herewith filed, marked 'Exhibits A and B,' and made a part hereof.

"It is further represented to the court that the parties above mentioned are the same individuals now prosecuting this appeal, for the identical accusation, on the same statement of facts, and in fact being one and the same in all respects; all of which will more fully appear by reference to the transcript filed in this court at Austin on May 23, 1879, which transcript is herewith filed, marked 'Exhibit C,' and made a part hereof.

"It is further represented to the court that all the aforesaid proceedings, as shown by the transcript, were had before indictment found; that at the May term, 1879, of the District Court of Robertson County, an indictment was found by the grand jury against the appellants for murder in the first degree. A copy of the indictment is herewith filed, marked 'Exhibit D,' and made a part hereof. No application for bail since the indictment was found has been made to the district judge, so far as these records show.

"The premises considered, the appellee moves to dismiss the appeal, because, *first*, after dismissing their own appeal, the appellants are not entitled to a second one; *second*, after an indictment, an appeal cannot be prosecuted on the evidence taken on the hearing of a *habeas corpus* before the indictment was found and bail refused." The character of the exhibits is indicated in the motion.

Thomas Ball, Assistant Attorney-General, in support of his motion to dismiss, cited Code Cr. Proc., arts. 174, 186, 187, 188; Bill of Rights, sect. 11; *Brown v. The State*, 5 Texas Ct. App. 546. On the merits he cited *Ex parte Foster*, 5 Texas Ct. App. 625, and *Ex parte McKinney*, 5 Texas Ct. App. 500.

Argument for the appellants.

Hubbard & Whitaker and *W. H. Hamman*, for the appellants. In response to the position of the assistant attorney-general, that this appeal cannot be heard now by this court because the same has once been determined or dismissed at the last Austin term, we reply: First, that the mere temporary refusal (or omission even) to prosecute an appeal from the judgment of the district judge sitting in vacation, before this court, after the same has been filed, cannot forfeit any right of the appellants to *perfect their remedy* of appeal under the laws; that remedy of the citizen, when deprived of liberty, is first before the district judge, to inquire into the alleged illegal restraint of the petitioner, and, second, if bail is refused, to appeal to this court for the correction of the errors of the court below, if any exist.

It is submitted that the right of appeal in cases of *habeas corpus* is surrounded and protected by the same immunity from technicalities and informalities as surrounds and has always surrounded the exercise of the writ itself in the first instance. There are no limitations as to time within which the original application for the writ shall be made, if before trial and conviction. Nor does the statute prescribe any limitations of time within which an appeal may be prosecuted to this court from a judgment on *habeas corpus*.

It may be done, and is a sacred and constitutional prerogative of the citizen; and the right to prosecute and have his appeal heard and determined upon all its merits, as disclosed by the transcript of the evidence certified by the district judge, is as unquestioned as the right to invoke the writ in the beginning when first restrained of his liberty. *Vide* Code Cr. Proc., tit. "*Habeas Corpus*," and especially arts. 146, 147, *et seq.* A judge may of his own motion issue the writ. Also, arts. 186, 187, 881, 884, 885. Nowhere is there any forfeiture of the right of appeal.

The analogies of the law and practice sustain this position. For instance: The State's counsel, of his own motion,

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enters a *nolle prosequi* in any criminal case, but the State, either by information or indictment, prosecutes the same party again, and for the same offence; because the reason of the law says there has been as yet no final hearing, no final judgment barring the State. *A fortiori*, would not it follow that in the exercise of the right of appeal from the action of a district judge on *habeas corpus* denying bail the appellant might say to this court, "For the present we decline to prosecute the appeal; we pay the costs and remain in prison"? Does not the *status* of the appellant remain the same, and may he not again before trial prosecute an appeal to the only tribunal which can give or deny him liberty?

Even in civil cases, when a plaintiff enters a nonsuit he may again, within statutory limitations, renew his suit before the same tribunal. This case stands separate and apart from cases on appeal from civil judgments.

We are pursuing a remedy as old as liberty, and sacred wherever the English language is spoken, — to invoke the writ of *habeas corpus*, with all its incidental privileges guaranteed to the citizen. The greatest of these incidents is the right of appeal. We have not exhausted that remedy. Before any trial, we asked, without detriment to the State (because we are in custody), to withdraw our appeal. The action of the court in response to our request was no judgment on the merits of our application for liberty.

WINKLER, J. The appellants and one Stearnes having been committed to the jail of Robertson County without bail, by a justice of the peace of that county, charged with the murder of one George Morse, sued out a writ of *habeas corpus* returnable before the Hon. Spencer Ford, judge of the Ninth Judicial District, for the purpose of inquiring into the legality of their being restrained in their liberty. On a hearing of the charge, and the evidence in support of and against it, the district judge admitted Stearnes to bail, but

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refused bail to these appellants and remanded them back to jail. From the judgment and order of Judge Ford, refusing bail and remanding them to jail, an appeal was prosecuted to the Austin branch of this court, and a transcript of the proceedings had before the district judge was filed in this court at Austin, on May 23, 1879. On May 31, 1879, counsel for the appellants filed their motion in writing, in which the court was asked to dismiss their appeal and allow the withdrawal of the record of the case from the files; which motion was granted by the court, and the appeal ordered to be dismissed, at the costs of the appellants. The date of the order of dismissal is May 31, 1879.

The case now before the court is another appeal from the same judgment and order of Judge Ford, and the proceedings had before him on hearing of the *habeas corpus*, as was involved in the appeal returnable to the Austin branch of this court, and dismissed by order of the appellants, as above set out.

The assistant attorney-general now moves the court to dismiss the present appeal, and, among other grounds, for the reason that the parties have already had the benefit of one appeal, and that they are not by law entitled to another. To this ground of the motion on the part of the State the appellants respond, in effect, that although it is not denied that an appeal was taken to this court heretofore, that appeal was dismissed at the instance and at the cost of the appellants, and that there has been no hearing of the case on its merits; and that the appellants ought not to be precluded from a hearing on the merits of this, notwithstanding the dismissal of the former appeal on their own motion. The question here presented is as to the effect of dismissing the former appeal.

It is conceded that there is no authority accessible to counsel or court which is decisive of the question. It is argued on behalf of the appellants that the right of appeal

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stands on as high grounds as the right to the writ in the first instance, and that there is no limitation fixed by the Habeas Corpus Act within which an appeal must be presented, and that, by the analogies of the law, the present appeal should be entertained.

We are not prepared to yield to the argument so forcibly presented by counsel. We do not question the great importance of this ancient writ of right to the citizen, and are not disposed to withhold from it its full scope and legitimate operation in inquiring into the cause of restraint of one who makes a *prima facie* case of being illegally restrained in his liberty; but we must be permitted to say that in the present case, agreeably to the record before us, these appellants have had the benefit of an inquiry into the cause and manner of their restraint, and competent legal authority has determined that they are not illegally restrained. It will hardly be seriously contended that the writ of *habeas corpus* can be invoked for the purpose of setting at large, with or without bail, those who are legally restrained in their liberty. So we are of opinion that this court does not on appeal open the investigation anew; on the contrary, the appeal in a *habeas corpus* case is required to be heard and determined upon the law and the facts arising upon the record. Code Cr. Proc., art. 884. From these and other expressions in the Code we conclude that the right of appeal does not stand on the same foundation as does the writ originally, and that by analogy to the law in all other cases, both civil and criminal, there must necessarily be some point of time after which an appeal would not lie.

Again: the right of appeal is not thrust on any person; he may avail himself of it in a proper case, or decline to do so, at his option; and so we are of opinion that after the party has availed himself of the legal right of appeal he may also prosecute it to a hearing, or abandon or dismiss it, at his own election. But we are further of opinion that

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there is no authority of law for the prosecution of more than one appeal from the same judgment. If any such authority exists, we are not aware of it. It is now the practice, even in felonies, to permit an appellant to abandon and dismiss his appeal if he so desires.

The motion of the assistant attorney-general must prevail; and because these appellants have heretofore had the benefit of an appeal, which they have abandoned by procuring its dismissal, the present appeal must also be dismissed for want of authority of law to prosecute it.

Appeal dismissed.

PEDRO HEMANUS v. THE STATE.

1. PRACTICE IN THE COURT OF APPEALS. — Unless signed and approved by the judge who presided at the trial below, a document embodied in the transcript, and purporting to be a statement of facts, cannot be recognized as such by this court, though signed by counsel for the State and the defendant; and, without a statement of facts, this court will consider only the indictment, the charge of the court below, and matters so presented by bills of exception as to be determinable without a statement of the facts of the case.
2. ASSAULT WITH INTENT TO COMMIT RAPE — CHARGE OF THE COURT. — In a trial for this offence, the court below gave to the jury the statutory definition of rape, and the punishment for assault with intent to commit rape, but gave no instruction respecting an assault or an aggravated assault, and refused special instructions properly supplying the defects of the general charge on these elements of the offence. *Held*, that, the case being a felony, it was incumbent on the court, whether asked or not, to have given to the jury the law submitted in the requested instructions.

APPEAL from the District Court of Menard. Tried below before the Hon. W. A. BLACKBURN.

The case is disclosed in the opinion.

Hill & Runge, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

Opinion of the court.

WHITE, P. J, Appellant was indicted and convicted for an assault with intent to commit rape. Rev. Penal Code, art. 503. The statement of facts as exhibited in the transcript, though agreed to by the attorneys for the State and defendant, does not appear to have been approved or certified by the judge, and it cannot therefore be considered with reference to this appeal. Under such a state of case this court will only look to the indictment, charge of the court, and such bills of exceptions as can be determined in the absence of a statement of the facts.

In this case, the general charge of the court to the jury does not appear to have been filed by the clerk, but we find that the special instructions asked by defendant's counsel and refused by the court are filed and noted in a bill of exceptions, and that a bill of exceptions was also reserved to the charge of the court as given, because it did not define an assault. If the paper copied into the transcript, purporting to be the charge, is in fact the charge as given, then it is defective in the matter complained of; for it simply defines rape, and instructs the jury as to the statutory punishment for an assault with an intent to commit rape, with a closing paragraph upon the presumption of innocence and the reasonable doubt. No information was afforded the jury as to the constituent elements of an assault and aggravated assault and battery. As was said by our Supreme Court in *Pefferling v. The State*, "under the indictment the appellant might have been convicted of an aggravated assault, if the jury believed from the evidence that such a verdict would be more in consonance with the truth of the case than would the verdict for the more heinous crime [assault with intent to commit rape] of which they found appellant guilty." 40 Texas, 486; *Curry v. The State*, 4 Texas Ct. App. 574.

The special instructions asked by defendant's counsel and refused by the court presented a part of the law directly applicable to the case, which was not embraced in the gen-

Opinion of the court.

eral charge, and which it was the duty of the court to have given, whether asked or not, the case being a felony.

Because the court erred in not charging the law applicable to the case under any state of the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

D. WHITE v. THE STATE.

PLEA. — Without a plea there was no issue for the jury to try or the court below to determine; and if there was a plea made by or entered for the defendant, it is essential that it be affirmatively shown by the record. So obvious a requirement should not be so often overlooked.

APPEAL from the District Court of Kaufman. Tried below before the Hon. G. J. CLARK.

The indictment and conviction were for the theft of a watch worth more than \$20, and two years in the penitentiary the punishment assessed.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. It is not shown by the record that defendant ever pleaded to the indictment in this case, or that, standing mute, a plea was entered for him. *Gorman v. The State*, 6 Texas Ct. App. 112.

It appears almost incredible that this omission should so frequently occur, after the many and repeated decisions on the subject, and when the duty with regard to the plea is so plainly and positively enjoined by law. If there was in fact no plea, then there was no issue for the jury to try or the court to determine; if there was a plea, then the record must show it affirmatively, or the case will be reversed on appeal until it is shown.

Statement of the case.

The attention of the judge is called to the fact that a portion of a charge to the jury, when subjected to strict rules of criticism, might be obnoxious in that it assumes matters essential to have been proven.

Because there is no plea in the record, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

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B. F. BRADBERRY v. THE STATE.

1. **PERJURY.** — **INDICTMENTS** for perjury are sufficient in substance, under the Code of this State, if the essential constituents of the offence are alleged in plain and intelligible words. They need not conform to common-law requirements or precedents.
2. **SAME.** — Though an indictment for perjury must show that the oath or affirmation was administered by a tribunal or officer lawfully authorized to administer it, yet it need not aver the means whereby the authority was acquired, — as, for instance, the election, qualification, or commission of a justice of the peace. It is sufficient to aver that the official who administered the oath or affirmation was a justice of the peace, having authority to administer oaths.
3. **COUNTY ATTORNEYS** have authority, by an act of 1876, to administer oaths to complaints cognizable by justices of the peace, as well as to complaints or affidavits made as bases for informations in the County Courts.
4. **PERJURY** may consist not only in false and corrupt testimony relative to the main fact immediately at issue, but also in such testimony relative to material circumstances which tend to prove that issue, and irrespective of the truth or falsity of the main fact at issue.

APPEAL from the District Court of Hunt. Tried below before the Hon. G. J. CLARK.

The opinion discloses the case. The jury found the appellant guilty, and assessed his punishment at five years in the penitentiary.

E. W. Terhune, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

Opinion of the court.

WHITE, P. J. We are of opinion that the indictment for perjury as set out in the record is good under our Code and the previous decisions of our courts. The authorities relied upon by counsel in support of his motions to quash and in arrest of judgment have been passed upon by our Supreme Court in connection with questions similar to those presented here, and have been held unauthoritative in this State.

In *Allen v. The State* it was said: "The averments introductory to the statement of the false testimony, and those which are incidental and collateral to it, — such, for instance, as refer to the tribunal in which the false testimony was given, and its authority to administer the oath, the nature of the proceeding pending before it, and its jurisdiction on the same, — are not, it is true, set forth in the indictment with that particularity of detail which was common in the English courts prior to the statute of 23 Geo. II., c. 11, and in some of the American courts where this or a similar statute is not in force. *The State v. Gallimore*, 2 Ired. 372; *Lodge v. The Commonwealth*, 2 Gratt. 579. This particularity of statement, however, in regard to introductory matters, by way of predicate for the averment of the facts which constitute the offence, has not been customary in indictments of this kind in our courts, even before the adoption of the Code, since which all that is required in charging the offence is that it be set forth in plain and intelligible words; the obvious import of which is, if each of the essential constituents of the offence as defined by the Code are alleged in plain and intelligible words in the indictment, it is sufficient." 42 Texas, 12.

Nor was it necessary that the indictment should have alleged more, with regard to the officer who administered the oath under which the perjury is charged to have been committed, than that he was a justice of the peace, having authority to administer oaths; it is not necessary to set out the various facts which conferred the authority, such as his

Opinion of the court.

election, qualification, commission, etc. *Stewart v. The State*, 6 Texas Ct. App. 184.

One of the principal errors complained of is that the affidavit or complaint upon which the trial was had wherein the perjury is averred to have been committed was no affidavit in fact, and that the whole proceeding was therefore a nullity. This affidavit was made before the county attorney, and it is insisted that under the statute that officer is not invested with authority to take an affidavit or complaint under oath administered by himself, except in cases where the same is to be used by him as the basis for and in connection with an information charging the offence.

Such is not our understanding of the law. "Upon complaint being made before the county attorney that an offence has been committed which the County Court or a justice of the peace has jurisdiction to try, it shall be the duty of the county attorney to reduce the complaint to writing, and cause the same to be signed and sworn to by the complainant, and it shall be duly attested by the county attorney." Gen. Laws 15th Leg., p. 87, sect. 13. And the next section expressly provides that "the complaint specified in sect. 13 of this act may be made before any judge of the County Court, county attorney, or justice of the peace; and for the purpose of carrying out the provisions of this act, the county attorney is hereby authorized to administer an oath." Sect. 14. There can be no doubt as to the authority here conferred to administer the oath, and that an affidavit made before and attested by this officer is legal and valid. Shall it be said that a legal and valid affidavit becomes null and void simply because it is not used as the basis for an information, and that it cannot be used for the same purpose and to the same extent that any other valid affidavit can? Justices of the peace are required to try complaints made before them or any other officer authorized by law to administer oaths. Acts 15th Leg., p. 165, sect. 29; p. 167, sect. 35. The objection taken to the affidavit in this instance is untenable.

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At the time the perjury is charged to have been committed, one Morgan was being tried upon complaint before a justice of the peace for unlawfully carrying a pistol on the 7th of December, 1878, between the toll-bridge on the Sabine River and the residence of Henry Walls on the Greenville and Sulphur Springs road. Appellant Bradberry had sworn that he was with Morgan at the time and place indicated, and that Morgan had no pistol. On the present trial, Morgan was, over objection of defendant, made to answer if he had not on that same evening fired a pistol within about one hundred and fifty or two hundred yards of the widow Holtman's house. The objection was that the evidence was irrelevant and immaterial; and if it was sought for the purpose of contradicting the witness, then it could not be used to subserve such a purpose, as the matter inquired about was collateral and foreign to the issue being tried.

Such is not our view of the evidence. It was pertinent to the issue, which was whether Morgan had a pistol at the time and on the occasion charged; and it was a part of the transaction, because the evidence shows that the two shots fired at Mrs. Holtman's were fired but a short distance from and but a short time after he had fired the shot in the Sabine bottom, about which the prosecution arose, and the fact tended strongly to prove and support the charge that he did have a pistol at the time and place indicated, — that fact having been deposed to by witnesses previously examined, — and tended in the same manner to falsify the evidence of defendant before the justice of the peace, which was assigned as perjury.

A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also in swearing falsely and corruptly as to material circumstances tending to prove or disprove such fact; and this without reference to the question whether such fact does or does not exist. It is as much perjury to establish the truth by false testimony as to maintain a falsehood by such testi-

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mony, and the fact that the former may lead to a correct decision is immaterial. *The Commonwealth v. Grant*, 116 Mass. 17; 1 Hawley's Am. Cr. Law, 500. We see no error in the ruling of the court in this regard.

There are several objections urged to the charge of the court, some of which are already answered in the views above expressed; and as to the remainder, they are in our opinion untenable. As a whole, the charge is unobjectionable, and no error was committed in refusing the special instructions asked for defendant. No sufficient reason is shown for a reversal of the judgment, and it is therefore affirmed.

Affirmed.

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G. W. MCCOY v. THE STATE.

1. VERDICT. — It is now elementary that bad spelling does not vitiate a verdict which has the requisites of certainty and intelligibility; and the rule is well established that verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be avoided save from necessity originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice.
2. SAME. — In a verdict of conviction for rape the punishment was assessed at "a five years in the State prisin." *Held*, a sufficient verdict. The word "a" may be eliminated as surplusage without vitiating the verdict, and the "State prison" necessarily means the State penitentiary.
8. CHARGE OF THE COURT. — In its introductory clause the charge inadvertently stated that the offence was alleged to have been committed in 1879, whereas the indictment laid the year as 1878. Subsequent clauses, however, repeatedly referred the jury to the indictment for the time alleged therein. *Held*, that the mistake could not possibly have misled the jury, or in any wise have prejudiced any right of the defendant.

APPEAL from the District Court of Somervell. Tried below before the Hon. T. L. NUGENT.

The jury found the defendant guilty, and assessed his punishment at five years in the State penitentiary.

Opinion of the court

J. J. Farr and Reaves & Dodd, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Appellant was indicted, tried, and convicted of rape, and his punishment affixed at five years in the penitentiary. A motion was made to quash the indictment, which was properly overruled because the indictment charges the offence in plain and intelligible words, and is sufficient in every respect when tested by the well-established precedents. It is unnecessary that we should cite authorities; they are to be found in nearly every volume of our State reports, and appellant has not cited a single authority in support of his motion to quash.

Exception is taken to the sufficiency of the verdict. The verdict is in these words: "We, the jury, find the defendant guilty, and assess his punishment a five years in the State prisin." The rule is now elementary that bad spelling will not vitiate a verdict when it has the requisites of being certain and intelligible. See the whole subject discussed, and authorities collated and discussed, in *Taylor v. The State*, 5 Texas Ct. App. 569.

"Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice." *Taylor's Case, supra*.

Two objections are urged to this verdict:—

1. That the article "a" is used instead of and where the preposition "at" is necessary to make the sense complete.
2. The punishment is fixed in the "State prisin," a place not known to the laws of Texas.

With regard to the first objection, it is clear that the writer, in framing the verdict, omitted the letter "t" inadvertently; but, if necessary, the article "a" as used in the verdict could be treated as surplusage, and the verdict

Opinion of the court.

would, if it were eliminated, be sufficiently certain and intelligible. *Curry v. The State*, decided at the present term, *ante*, p. 267.

As to the second objection, the same question was before this court in the case of *Moore v. The State*, at the present term, and it was said: "We are of opinion the words 'in the State prison' are equivalent to the State penitentiary, that being the only State prison known to the law." *Ante*, p. 24.

The indictment charged the offence to have been committed on the twenty-ninth day of June, 1878. In his charge to the jury, the judge, in the preliminary statement of the nature of the case on trial, tells them that defendant is charged with rape "alleged to have been committed on the 29th day of June, A. D. 1879." It is too plain to admit of controversy that the mistake in the year is one entirely clerical, and one which could not possibly mislead the jury. In the succeeding paragraph, which was really the first of the charge proper, he tells the jury, "In this case, to convict the defendant it must be shown to your satisfaction, *first*, that the defendant did, in the said county of Somervell, at or about the time laid in the indictment, have carnal knowledge of the said Frances Thomas," etc. Again, in the fourth paragraph, "If, therefore, you believe from the evidence that the defendant, at or about the time and in the county laid in the indictment," etc. The same phraseology is again used in the fifth paragraph, the attention of the jury being all the time called to the date as alleged in the indictment, and which indictment they had with them in their retirement when they were considering their findings.

The charge is not liable to any of the criticisms made upon it in the assignment of errors or brief of counsel; it is a clear, full, and forcible presentation of the law applicable to the case, and one which for fairness cannot in reason be complained of by defendant.

Statement of the case.

Defendant has to all appearances been fairly and impartially tried and convicted of one of the most heinous offences known to our law, and, where death might have been inflicted (Penal Code, art. 534), he has received the mildest possible punishment. We see no error in his trial and conviction, and the judgment is therefore affirmed.

Affirmed.

HENRY SMITH v. THE STATE.

1. THEFT — INTENT — CHARGE OF THE COURT. — When, in a trial for theft, there was evidence, though vague, which tended to show a *bond fide* purchase of the property by the defendant, it was the duty of the court below, whether asked or not, to have submitted that issue in the charge to the jury; and this court will take cognizance of omissions of this character, though not assigned as error nor urged here as cause for reversal.
2. SURPLUSAGE. — INDICTMENT for theft of a mule alleged that it was the property of an owner unknown, and was taken from the possession of one D., who had estrayed it and was holding it for the owner, and was taken without the consent of D. *Held*, that the material and issuable matter in this allegation was that the animal was a mule which was an estray, and was in the possession of D., and taken therefrom without his consent. That D. had estrayed the animal was not a descriptive or material averment, but surplusage.
3. VARIANCE is a disagreement between the allegation and the proof in some matter legally essential to the charge.
4. CHARGE OF THE COURT. — When, as in this case, the inculpatory evidence was in the main circumstantial, the law governing that character of evidence should have been given in charge to the jury.

APPEAL from the District Court of Tarrant. Tried below before the Hon. A. J. HOOD.

The allegations in the indictment are fully disclosed in the opinion. The jury found the defendant guilty, and assessed his punishment at six years in the penitentiary

H. M. Furman, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

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CLARK, J. The evidence introduced by the prosecution tended to show that the defendant might have purchased the animal claimed to be stolen, from another person, in good faith and without any fraudulent intention on his part. No matter how vague this evidence may have been, nor how improbable it might be that the jury would make that deduction, yet, as it was a possible legitimate deduction, the court should not have withdrawn that issue from their consideration by failing to include it in his charge; and this omission cannot pass unnoticed on appeal, even though no instruction was asked upon the point, nor the same assigned for error or discussed in the briefs and argument of counsel. *Camplin v. The State*, 1 Texas Ct. App. 108; *Ivey v. The State*, 43 Texas, 425; *Robinson v. The State*, 5 Texas Ct. App. 579; *Hamilton v. The State*, 2 Texas Ct. App. 494; *Bishop v. The State*, 43 Texas, 390; *Varas v. The State*, 41 Texas, 527; *Bray v. The State*, 42 Texas, 203, 560; *Kay v. The State*, 40 Texas, 29.

The indictment in this case charges the defendant with the theft of a certain mule, whose owner was unknown, and that the same was taken from the possession of one George Davis, who had the custody of said animal as an estray, and who had estrayed the same in the manner required by the law regulating estrays. It further charges that the animal was taken without the consent of Davis, who was holding the mule for the owner, and that it was done with intent to deprive the owner of its value. The proof shows that the animal was taken by John Davis, the father of George, to a justice of the peace and *ex officio* county commissioner, in the latter part of 1875, to be reported by such commissioner as an estray; and the commissioner, after taking a description of the animal, returned it to George Davis, to be kept by him until the day of sale. How or where the mule was taken up does not appear, but it seems that John Davis was acting for his son George in the matter, the latter living at the time on his father's place, and culti-

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vating for himself a portion of his father's farm, free of rent.

It is contended that this proof does not support the allegations of the indictment above recited, and we are referred to former decisions of this court to sustain the position. *Warrington v. The State*, 1 Texas Ct. App. 168; *Rose v. The State*, 1 Texas Ct. App. 401; *Watson v. The State*, 5 Texas Ct. App. 27. Neither of these cases are in point, nor are we aware that the precise question involved has been adjudicated in this State. We are therefore remitted to general principles for its proper solution.

The general doctrine of surplusage in indictments, and the well-defined exception of descriptive averments which could have been omitted in the first instance, but which, being employed, became material, are well understood, and need neither elucidation nor authority. The difficulty lies in a proper application of the rule or the exception. As said by this court in *Warrington's Case*, quoting from *United States v. Howard*, 3 Sumn. 15: "The material facts which constitute the offence charged must be stated in the indictment, and they must be proved in evidence. But allegations not essential to such a purpose, which might be entirely omitted without affecting the charge against the defendant and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage." 1 Texas Ct. App. 168. See also Archb. Cr. Pr. 101; 3 Ph. on Ev. 668; 1 Bishop's Cr. Proc., sect. 482 *et seq.*

Applying these principles to the indictment at bar, we are of opinion the allegation that George Davis had estrayed the animal in the manner required by law, is not a descriptive averment, and comes clearly within the rule, and its

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reason, which authorizes courts to disregard it as surplusage. The material, issuable matter was that the animal was an estray, and was in the possession of George Davis, who was holding the same for the owner, and that the same was taken from George Davis's possession without his consent. This the evidence fully establishes. The allegation as to a compliance by George Davis with the laws regulating estrays relates to the character of the property, rather than to its identification or description, and the animal is described simply as "one mule." Variance is "a disagreement between the allegation and the proof, in some matter which, in point of law, is essential to the charge or claim." 1 Greenl. on Ev., sect. 63; 1 Bishop's Cr. Proc., sect. 485. And "matter which is merely useless never vitiates." *The State v. Elliott*, 14 Texas, 426. The instructions requested upon the subject of variance were properly refused.

The material evidence in this case being in its nature circumstantial, the court should have instructed the jury as to the law governing that character of evidence, especially as such instruction was requested. *Harrison v. The State*, 6 Texas Ct. App. 42; *Hunt v. The State*, ante, p. 212.

The indictment appears to us as sufficient under the law, and the other errors assigned are not supported by the law and the record.

The judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

GEORGE DORAN v. THE STATE.

1. MURDER IN THE FIRST DEGREE—CHARGE ON PENALTY.—Instead of death alone, as formerly, the Revised Penal Code provides that the punishment for murder in the first degree "shall be death or confinement in the penitentiary for life." The punishment as thus prescribed must, in

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trials for murder, be given in charge to the jury, and should be so given that no preference of the court between the alternatives be indicated to the jury, whose duty it now is to determine for themselves and find by their verdict which of the alternative punishments shall be imposed when a conviction is had for murder in the first degree. Note the distinction taken between this provision of the Revised Penal Code and that on the same subject of the Constitution of 1869.

2. **SAME — VERDICT.** — In a trial for murder, had since the Revised Codes took effect, the verdict found the defendant "guilty of murder in the first degree," but assessed neither death nor confinement in the penitentiary for life as his punishment. *Held*, insufficient to support a judgment.

APPEAL from the District Court of Navarro. Tried below before the Hon. D. M. PRENDERGAST.

The indictment charged the appellant with the murder of William Fitzsimmons, on June 1, 1879, by stabbing him with a knife. All matters of any present signification are clearly disclosed in the opinion. If credence be allowable to the unsigned document called a statement of facts, the fatal assault upon the deceased was utterly without provocation or premonition on his part, but ensued promptly upon a woman's expression of her preference for the deceased as her companion for the night, rather than the defendant.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The provisions of our present Code regulating the penalties for murder in the first degree are not similar in phraseology or effect to the laws in that respect in force in this State pending the existence and operation of the Constitution of 1869. Under the latter, the penalty for murder in the first degree was fixed at death, but juries were authorized in their discretion to substitute imprisonment for life for the death-penalty, in any case they might deem a proper one for the exercise of this discretion. *Hunt v. The State*, ante, p. 212; *Marshall v. The State*, 33 Texas, 664. It was proper to instruct the jury, in all pros-

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ecutions for murder while the Constitution of 1869 was in force, that they might find the defendant guilty of murder in the first degree, and, if they did not desire to exercise their discretion as to the commutation, their verdict need only find the fact of guilt, the law fixing the penalty absolutely for that offence.

By the changes in the law which took effect July 24, 1879, juries were again invested with the discretion as to the infliction of imprisonment for life instead of death ; but this mode of punishment was made a distinct legal penalty, along with the other penalty of death ; imposing the duty upon a court of stating both penalties to the jury, without any discrimination, express or by implication, as to which penalty was preferable, and leaving the jury to determine that question for themselves.

The old law prescribed that the punishment of murder in the first degree should be death. Penal Code, art. 612a. The new law says : “ The punishment for murder in the first degree shall be death, or confinement in the penitentiary for life.” Rev. Penal Code, art. 609. By the old law, if the jury should find any person guilty of murder, they were required to find whether it was of the first or second degree. Pasc. Dig., art. 2268. The same duty is likewise imposed upon the jury by the new law, with the additional duty, not incumbent on them before, that they should find the punishment, no matter what the degree may be, nor whether the verdict is based upon a plea of guilty or not guilty. Penal Code, art. 607.

In this case the court instructed the jury as follows : “ If you believe from the evidence in this case that the defendant cut with a knife and killed William Fitzsimmons, as charged in the indictment, and that this was done with express malice, and the evidence fails to show any circumstances of mitigation, excuse, or justification, you will then find him guilty of murder in the first degree, and will so say in your verdict, and you need not add more ; in which

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case, the law affixes the penalty of death. Or you may in your discretion fix his punishment at confinement in the penitentiary for life." The verdict was as follows: "We, the jury, find the defendant guilty of murder in the first degree." The charge is erroneous for the reasons above indicated, and the verdict will not support a judgment, because it fails to find the punishment.

A paper seeming to contain the evidence on trial appears in the record, but is not authenticated by the signatures of counsel and the approval of the judge. While we cannot consider it as a statement of the facts in evidence, we deem it not improper, in view of another trial, to say that if the evidence relating to the dying declarations of deceased is correctly set forth in the paper, such declarations should not have been admitted on the trial, there being no sufficient showing that they were made under a consciousness of approaching death, and with no hope of recovery, on the part of the person making them. Code Cr. Proc., art. 748.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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JOHN HENRY v. THE STATE.

1. **INDICTMENT** must set out the name of the injured party, if known; but certainty to a common intent suffices in this feature of an indictment. It is sufficient if the party be designated by his Christian and surname, or by a name acquired by reputation; or if the name alleged be *idem sonans* with the true name, though differently spelled, it is sufficient.
2. **IDEM SONANS.** — A stringent rule is not applied on this subject. If, without doing violence to the orthography, the names may be sounded alike, the discrepancy is immaterial.
3. **SAME — CASE STATED.** — Indictment for murder charged that the accused made an assault on one Whitman, by shooting the said Whitman, and thereby wounded "him, the said Whiteman," in the breast and face of him, the said Whitman, by giving him, the said Whitman, two mortal wounds, of which the said Whitman instantly died. Defence moved to quash, and in arrest of judgment, because of uncertainty resulting from the discrep-

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ancy between Whiteman and Whitman. *Held*, that the allegations of the indictment preclude any uncertainty, and the names are *idem sonans* and the same.

4. SAME — ALLEGATA ET PROBATA — CHARGE OF THE COURT. — There was evidence that the deceased was called Whitman by some people and Whiteman by others, and answered to either name. *Held*, not error to instruct the jury that if the deceased was known by the one as well as the other name the difference between them was immaterial.

APPEAL from the District Court of Navarro. Tried below before the Hon. D. M. PRENDERGAST.

The appellant and the deceased, and all the witnesses to the homicide, were negroes. A fight, it appears, had been going on between the deceased and one Jim Young, but was about stopped by the intervention of friends, when the appellant, who seems to be a connection of Young, stepped out of a neighboring house, gun in hand, and called out, "Clear the track, G—d d—n it, I'll settle that difficulty." Immediately he levelled, aimed, and fired his gun at the deceased, who, after walking a few steps, fell down and died. The testimony disclosed the utmost deliberation on the part of the appellant. It seems from the evidence that deceased was usually called Whiteman by the negroes, and Whitman by the white people, but he recognized either name by responding to it when called. The homicide was committed January 8, 1879, and the trial was had in the following June. The verdict was murder in the first degree, whereupon judgment of death ensued. The defence was conducted by appointed counsel, who file in this court a printed brief and argument of marked ability.

J. H. Rice and Rufus Hardy, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The most important questions presented by the record in this case are, *first*, the sufficiency of the indictment; and, *secondly*, the sufficiency of the testimony

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adduced on the trial to support the material averments in the indictment.

With regard to the indictment, the name of the person alleged to have been murdered is set out several times. So much thereof as is necessary to present clearly the grounds of objection is here set out. The indictment, after proper formal averments, and giving time and place, proceeds as follows: "Then and there unlawfully, wilfully, feloniously, and of his malice aforethought, in and upon one Alonzo Whitman, in the peace of God and the State then and there being, an assault did make, and that the said John Henry a certain gun then and there loaded and charged with gunpowder and divers leaden shot and bullets, which said gun he, the said John Henry, in both his hands then and there had and held, then and there unlawfully, wilfully, feloniously, and of his malice aforethought did discharge and shoot off, to, against, and upon him, the said Alonzo Whitman, and that the said John Henry, with the leaden shot and bullets aforesaid out of the gun aforesaid then and there, by force of the gunpowder aforesaid, by the said John Henry discharged and shot off as aforesaid, then and there unlawfully, wilfully, feloniously, and of his malice aforethought did strike, penetrate, and wound him, the said Alonzo Whiteman, in and upon the right breast, below the nipple, and in and upon the right side of the face, below the right eye, of him, the said Alonzo Whitman, giving to him, the said Alonzo Whitman, then and there, with the leaden shot and bullets aforesaid so as aforesaid discharged and shot out of the gun aforesaid by the said John Henry, in and upon the right breast, just below the nipple, and upon the right side of the face, below the right eye, of him, the said Alonzo Whitman, two mortal wounds of the depth of six inches and the width of half an inch, of which said two mortal wounds he, the said Alonzo Whitman, then and there instantly died; and so the grand jurors," etc.

There were some formal and unimportant objections

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urged, but the material objection taken to the indictment, both in the motion to quash and in the motion in arrest of judgment, is to the effect that the indictment does not charge with sufficient certainty who was the person charged to have been killed, or what was his name. In other words, it is claimed that it is "doubtful in this: that it charges an assault upon one Alonzo Whitman, and then charges the striking, penetrating, and wounding of one Alonzo Whiteman, and in conclusion charges the death of one Alonzo Whitman as resulting from the assault upon Whitman and the wounding of Whiteman."

By comparing the objection with the indictment, the inaccuracy in stating the objection will be apparent. When the name of the deceased is first mentioned, which is in connection with the assault, he is described in the indictment as *one* Alonzo Whitman, and elsewhere as *the said* Alonzo Whitman, except in one instance, where the name is written "*the said* Alonzo Whiteman;" and the sole question here presented is, Does this difference of a letter in one instance from the orthography of the name both before and after leave it uncertain as to the name stated in the indictment? If the name is the same wherever it occurs, notwithstanding the difference in the orthography, the objection falls to the ground. Is it all the same, or two different names?

That the law requires the name of the injured party to be set out in every indictment, if known, and that, if unknown, that fact must be stated, is too well settled to admit of controversy. The reason for this rule is that there may be no uncertainty as to what the accused is called on to meet on the trial. It seems, however, that in stating the name of the injured party, whilst the law attaches importance to the fact that the name shall be stated, and correctly stated, yet certainty to a common intent satisfies the demands of the law. It is enough to state a party injured, or any person except the defendant, by their Christian and surnames. Am. Cr. Law, sect. 250. A description of a

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person, in legal proceedings, by the name acquired by reputation has been held sufficient. *Id.*, sect. 257. "If the name in the indictment be spelt differently from the real and usual mode of spelling it, but be *idem sonans* with it (and whether it be *idem sonans* seems to be a question left to the jury), it will be sufficient; otherwise not." Archb. Cr. Pr. & Pl. 80. In determining the question of *idem sonans*, the following quotation from the opinion of the court by Stone, J., in *Ward v. The State*, 28 Ala. 53, is believed to be applicable to the present inquiry: "The books abound in hair-breadth distinctions, but we apprehend the true rule to be that if the names may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial."

The following, among many others found in the books, are held to be *idem sonans*: Blackenship and Blankenship, McInins and McGinnis, Edmindson and Edmundson, Deadema and Diadema, Conley and Conolly. In *Gresham v. Walker*, 10 Ala. 370, it was said Usrey and Usury were *idem sonans*. "The law does not take notice of orthography; therefore if the name is misspelled no harm to the prosecution can come from this, provided the name as written in the indictment is *idem sonans*, as the books express it, with the true name. It is sometimes a nice matter to determine when the names are of the same sound; and the courts do not in this matter hold the rule of identity with a strict hand." 1 Bishop's Cr. Proc., sect. 688. "If two names are in original derivation the same, and are taken promiscuously in common use, though they differ in sound, there is no variance." 2 *Id.*, sect. 689.

We are of opinion that the name spelled Whiteman at one place in the indictment is the same name, under the rules of *idem sonans*, as Whitman in other parts of the indictment, and that the court did not err in overruling the motion to quash and in arrest of judgment.

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But it is insisted on the part of the appellant that in the name of the deceased there was a fatal variance between that alleged in the indictment and the one proved on the trial, the point of difference being as to whether the name was in fact Whiteman or Whitman. Under the evidence adduced, the court, at the instance of the county attorney, gave to the jury this instruction: "If the jury believe from the evidence that the person alleged to have been murdered in the indictment was named Alonzo Whitman, or that he was known and answered to that name, then the fact that he was called Alonzo Whiteman would make no difference, nor would it be of any consequence that the name of the party alleged to have been killed was Whiteman, and was spelled Whitman in the indictment." A charge on the same subject was asked by defendant's counsel, which was given with a qualification to harmonize it with the charge given at the instance of the State. These charges, taken in connection with each other, were substantially correct in law, and properly submitted to the jury the question as to whether the deceased was known as well by one name as the other; and the jury having determined this issue against the defendant on the proofs adduced, he is in law concluded by the verdict. *Cotton v. The State*, 4 Texas, 260; *Owen v. The State*, decided at the present term, *ante*, p. 329.

There was a mass of conflicting testimony on the trial, from which it was the peculiar province of the jury to sift out the truth, under appropriate instructions from the court. All the questions arising upon the evidence were properly submitted under such instructions, and we cannot say that the jury were not warranted in their finding from the testimony. There being no material error manifested in the proceedings, our duty under the law is to affirm the judgment, and it is so ordered.

Affirmed.

Opinion of the court.

F. MARTINEZ v. THE STATE.

1. **PERJURY.** — The Penal Code expressly provides that the “statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury.” Art. 198.
2. **SAME.** — **INDICTMENT** alleged that a material inquiry in the trial of one H. for theft was whether said H. or one W. killed a certain steer, and charged that the accused swore that he “saw W. kill the steer about four months ago.” The traverse of this statement of the accused averred that the said W. “did not kill said steer at the time and place alleged” by the accused. *Held*, that the traverse negatives the time but not the fact that W. killed the steer; and as the time stated (*viz.*, “about four months ago”) was immaterial in the trial of H. for theft, this indictment assigns the perjury on a statement which was not material to the matter in respect to which it was made.

APPEAL from the District Court of Uvalde. Tried below before the Hon. T. M. PASCHAL.

The opinion sufficiently discloses the case.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. It appears that the matter assigned as perjury grew out of the testimony of the appellant in a trial in the District Court of Uvalde County, wherein one John Hannahan was being prosecuted for the theft of a steer. The matter assigned as perjury is thus stated in the indictment, after the usual formal averments, *viz.* : “Whereupon it then and there became material, upon the trial of said issue, whether the said John Hannahan or one Frank West killed the steer charged in the indictment to have been stolen by the said John Hannahan, and the said F. Martinez, being so sworn as aforesaid, wickedly contriving and intending to cause the said John Hannahan unjustly to be acquitted of said felony, did then and there knowingly, falsely, corruptly, wilfully, and deliberately depose and give in evidence to the jurors of the jury then and there duly accepted and

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sworn between the State of Texas and the said John Hannahan, before the said Thomas M. Paschal, judge as aforesaid, that he, the said F. Martinez, saw the said Frank West kill said steer, about four months ago [meaning from 16th October, 1879]; that he * * * was positive it was not more than four months ago. * * * When, in truth and in fact, the said Frank West did not kill said steer at the time and place as alleged by the said F. Martinez; all of which statements, made under oath as aforesaid, by the said F. Martinez, he, the said F. Martinez, then and there knew to be wilfully and deliberately false," etc.

Now, a material matter in issue, it will be observed, according to the allegation, was "whether Hannahan or West killed the steer." The perjury, it is charged, consisted in the witness stating that he saw West kill the steer about four months before, and this statement is negatived by the prosecution with the allegation, "When, in truth and in fact, the said Frank West did not kill said steer at the time and place alleged." As stated in the indictment, the allegations are insufficient to support an assignment for perjury. In the prosecution of Hannahan, the State was not bound to prove a particular time and place, provided the proof showed the time of the theft to be anterior to the filing of the indictment, and at a period not so remote as to be barred by limitation. "Four months," or the time stated by the witness, became then immaterial, and does not settle the material issue whether West or Hannahan killed the steer; for whilst it might not have been true that West killed him just "four months ago," it might nevertheless have been true that West did kill him within four months, or prior to that time within the period of limitation. There is, then, no inconsistency, in contemplation of law, between the statement of the witness and the fact that West did kill the animal, and that Hannahan was innocent of the crime. It follows, then, that the time fixed by the witness was wholly immaterial in law to the issue being tried.

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The pleader does not negative the fact that West killed the steer, but only the fact that he killed it "at the time and place as alleged by the said Martinez."

On the face of the indictment the matter assigned as perjury is not made to appear material, nor is it material. This is necessary to the sufficiency and validity of an indictment for perjury. *Smith v. The State*, 1 Texas Ct. App. 620. Our statute expressly provides that "the statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury." Rev. Penal Code, art. 193.

Defendant's motion in arrest of judgment should have been sustained.

Reversed and remanded.

H. S. WILLIAMS v. THE STATE.

1. MURDER — MANSLAUGHTER — CHARGE OF THE COURT. — If in a trial for murder the evidence tends, by any legitimate deduction, to prove that the homicide, though voluntary, was committed under the immediate influence of sudden passion, arising from a serious personal conflict, in which great injury was inflicted by the deceased, with weapons or by great superiority of strength, it is incumbent on the court to give in charge to the jury the law of manslaughter, even though the accused was the aggressor, provided the aggression was not with intent to bring about a conflict and kill the deceased. And if the court is in doubt respecting the necessity of such a charge, the doubt should be resolved in favor of the accused, and the charge be given.
2. SAME. — Whether the injury inflicted by the deceased upon the accused constituted "adequate cause" is a question of fact for the jury to determine, under proper instructions from the court.
3. SAME. — See evidence in a trial for murder requiring that the law of manslaughter should have been given in charge to the jury.

APPEAL from the District Court of Johnson. Tried below before the Hon. J. ABBOTT.

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The indictment charged the appellant with the murder of Joseph Robinson, by shooting him with a pistol, on the 20th of August, 1877. The jury found the appellant guilty of murder in the second degree, and assessed his punishment at fourteen years in the penitentiary.

In the opinion of the court will be found a clear recapitulation of all the material facts.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. In a prosecution for murder, whenever the evidence may tend, by any legitimate deduction, to establish the fact that although the homicide was voluntary, yet it was committed under the immediate influence of sudden passion, arising from a serious personal conflict in which great injury was inflicted by the person killed, by means of weapons, or other instruments of violence, or by means of great superiority of personal strength, it is the duty of the court to instruct the jury as to the grade of manslaughter, notwithstanding the person guilty of the homicide was the aggressor, provided such aggression was not made with intent to bring on a conflict, and for the purpose of killing. Penal Code, arts. 593, 597.

What amount of injury must be inflicted to produce the adequate cause specified in the statute, or what disparity of personal strength between the combatants must exist, cannot be fixed by any definite general rule, but must depend upon the particular circumstances of each particular case. Our law seems to fix the limits between an assault and battery so slight as to show no intention to inflict pain or injury, which is not an adequate cause, and a serious personal conflict in which great injury is inflicted in some manner by the deceased, which is pronounced adequate provided it be sufficient to produce and does actually produce such a degree of anger, rage, resentment, or terror in a person of

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ordinary temper as is sufficient to render the mind incapable of cool reflection. Penal Code, arts. 594, 597. The amount of the injury is therefore a question of fact for the determination of the jury, under proper instructions from the court; and in case of doubt in the mind of the judge as to the necessity of submitting the issue, such doubt should be resolved in favor of the prisoner. *Holden v. The State*, 1 Texas Ct. App. 225; *Lester v. The State*, 2 Texas Ct. App. 432; *Lyles v. The State*, 41 Texas, 180; *Hudson v. The State*, 40 Texas, 12; *Lindsay v. The State*, 36 Texas, 337; *Maria v. The State*, 28 Texas, 698. As said by the court in *Hudson v. The State*, above cited, "where there are any circumstances that would mitigate or reduce the offence to a lower grade, the defendant should have the benefit of those circumstances, under appropriate directions to be given by the court."

Tested by these principles, we are of opinion that the facts in evidence required that the jury should be fully instructed as to the law of manslaughter, and the omission of the court to give such instruction will require the reversal of the judgment. While there seems to have been some antecedent feeling between the deceased and the defendant, arising from their being suitors to the same lady, this feeling seems to have been principally, if not altogether, on the part of the deceased, the discarded suitor. The meeting on the morning of the difficulty appears to have been rather casual than designed, and certain portions of the testimony tend to indicate that the deceased went toward where defendant was travelling along the road, in company with others, and stopped upon meeting the defendant, when a conversation was held between them, the others in company with the defendant having passed on. Soon afterwards loud cursing was heard by them, and then three shots; and on returning to where the deceased and defendant had been left, it was found that the deceased was sitting on the side of the road, shot in the breast, and the defendant was

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standing near him with a pistol in his hand, and remarked, when the others came up, "We got into a row and I shot him; and if he is not satisfied, I will shoot him again." No one witnessed the difficulty. The deceased was ten or fifteen pounds heavier than defendant, and a stouter man. The physician who examined the body of the deceased, and who testified for the prosecution on the trial, stated on the trial that he saw the defendant after the difficulty, and he had a slight cut on the top of his ear, not an eighth of an inch deep, which seemed to have been made with an edged tool of some sort, and another wound on his arm, which seemed to have been made with the teeth, the skin being broken in a circular form and drawn toward the centre.

The fact that defendant had borrowed a pistol a day or two before, ostensibly to carry with him on a trip to the West, and that no arms were found upon the deceased, and no evidence of a conflict was apparent upon the ground, — which the evidence shows was not of that character which readily received and retained impressions from the human foot, — were circumstances proper to be considered by the jury in connection with the other facts in evidence, but did not authorize the court to withdraw from the jury a consideration of the issues arising at the very time of the difficulty, and which might legitimately tend to induce the inference upon the part of the jury that the defendant might be guilty of the lesser rather than the graver grade of homicide.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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J. WILLISON v. THE STATE.

CONTINUANCE. — In revising the refusal of a continuance asked on account of the absence of a witness, the materiality of the desired testimony is to be considered in the light of the evidence adduced at the trial.

APPEAL from the District Court of Falls. Tried below before the Hon. L. C. ALEXANDER.

The trial and conviction were for assault with intent to murder, and the punishment was assessed at two years in the penitentiary.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The application of defendant for a continuance was properly overruled. Apart from the fact that one of the absent witnesses was defendant's wife, and another his father-in-law, both of whom are shown by counter-affidavits not to have resided in the county of the prosecution, as alleged in the application, and the further fact that two others of the absent witnesses did appear and testify on the trial, the absent testimony, in view of the evidence, could not have been material, or in any manner have affected the result.

The application itself failed to show with distinctness the materiality of the absent testimony, and it satisfactorily appeared, on the hearing of a motion for new trial, that no injustice had been done. This offered an additional reason why the verdict should not be disturbed. *Hyde v. The State*, 16 Texas, 445; *Cooper v. The State*, 19 Texas, 449; *Bowman v. The State*, 40 Texas, 8; *Wright v. The State*, 44 Texas, 645; *Richardson v. The State*, 2 Texas Ct. App. 322; *Fernandez v. The State*, 4 Texas Ct. App. 419; *Murphy v. The State*, 6 Texas Ct. App. 420.

The judgment is affirmed.

Affirmed.

Statement of the case.

VANCE VICKERY v. THE STATE.

1. **SECOND CONTINUANCE.** — When, prior to the Revised Code, an application for a second continuance was in substantial compliance with the requirements of the law, and there was no competent counter-showing that due diligence had not in fact been used, or that the attendance of the absent witness could not be secured by the continuance, the application should have been granted.
2. **SAME.** — To controvert a sufficient application for a second continuance, the prosecution used affidavits of the sheriff and county attorney, to the effect that the prisoner, a few days before the trial, told them he had been informed that the absent witness had fled the country. *Held*, that such a statement, made by an uncautioned prisoner, and apparently based on hearsay or rumor, was entitled to no more consideration than if derived from any other unreliable source; and the continuance should have been granted, or else the trial postponed to enable the prosecution to substantiate its objection.
3. **PRACTICE.** — In the absence of due caution that his statements may be used against him, the law seals a prisoner's lips for all purposes of his trial, and allows nothing he says to be used to his detriment; and the practice of officials in using such statements, to countervail applications for continuance and the like, is reprehensible.

APPEAL from the District Court of Burleson. Tried below before the Hon. A. S. BROADDUS.

The indictment charged the appellant with the murder of one Sam Doss, by cutting him with a knife, on December 17, 1877. The conviction was for murder in the second degree, and ninety-nine years in the penitentiary the punishment assessed.

According to the testimony of the principal witness for the State, the homicide was wholly unprovoked, and apparently objectless. According to the defendant's application for a continuance, however, his absent witnesses would testify to facts clearly making a case of self-defence. The matters involved in the rulings are disclosed in the opinion.

N. G. Kittrell, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

Opinion of the court.

CLARK, J. The defendant's application for continuance, although a second application, was in substantial compliance with the statute, and should have been granted, in the absence of a counter-showing by the prosecution that due diligence had not in fact been used, or that the attendance of the absent witness could not be secured by a continuance. *Preston v. The State*, 4 Texas Ct. App. 186; *Dixon v. The State*, 2 Texas Ct. App. 530; *Perkins v. The State*, 1 Texas Ct. App. 114.

The absent witness, Brazelle, seems to have been duly attached in Milam County, the county of his residence, on January 15, 1879, and had given bond as such witness, with sureties, for his appearance before the District Court of Burleson County on the fourth Monday after the first Monday in February, 1879, and had been in actual attendance at that term of the court. The trial was had at a term of the court beginning on the first Monday in June, 1879, and not on the fourth Monday after the first Monday in September, the time theretofore fixed; the law regulating the times for holding said courts having been changed after the conclusion of the February term. Laws Reg. Sess. 1879, chaps. 48, 88.

The State controverted this application for continuance by the affidavits of the sheriff and the county attorney, to the effect that, a few days before the trial, the defendant, who appears to have been in jail, had stated to them he had been informed that the witness Brazelle had left the country on a charge of swindling; and the court, upon this showing, overruled the application.

We cannot regard the evidence afforded by those affidavits as sufficient to show either a want of diligence, or that the witness was beyond the jurisdiction of the court. The statement of defendant as to the whereabouts of the witness was evidently based upon a rumor which had come to his knowledge, and which might or might not be true; and this hearsay could not be invested with any greater authen-

Syllabus.

ticity because it came through the defendant than if detailed by the affiants as coming from some other source, — probably not as much. In view of the grave character of the charge against the defendant, and the change in the terms of the court, it would have been peculiarly proper for the court to have continued the case for the term, or postponed it to a future day, in order to afford the prosecution an opportunity to procure and produce for the information of the court some evidence of a substantial character, which might tend to show with a degree of definiteness that the facts stated in the application were not true, and that the witness had in fact absconded.

We deem it proper to add further, that the practice of officials in making use of statements made to them by a prisoner in jail, most probably through inadvertence, and without understanding or being cautioned that such statements would be used against him, is one not to be commended. Especially is this so when the prisoner, through poverty, has been deprived of the advice of counsel. In the absence of such caution, the law wisely and humanely seals the prisoner's lips for all purposes of trial, and permits nothing he may say, either through compulsion or ignorance, to be used to his detriment.

No other error is made manifest in the record, and the charge of the court was an admirable exposition of the law applicable to the case. But, for the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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GEORGE LACY v. THE STATE.

1. **ARREST.** — The authority to arrest without warrant is conferred and controlled in this State by statutory provisions, which must be construed in subordination to the constitutional guaranty against unreasonable searches and seizures.

Statement of the case.

2. **SAME.** — To authorize a peace-officer, or any other person, to make an arrest without a warrant of arrest, two things must concur: *first*, the arrest must be for an offence which the Code classifies either as a felony or an "offence against the public peace;" and, *second*, it must have been committed in the presence or within the view of the officer or person who attempts to make the arrest.
8. **CASE STATED.** — In a trial for murder in B. County, the defence proposed to prove, in effect, that the deceased had stolen a horse in another county, and, while passing through B. County with the horse, was killed by the defendant when the latter was attempting to arrest him without a warrant. *Held*, that the proof was properly excluded, on objection, for irrelevancy; for, though a prosecution for theft may be had in any county to or through which the stolen property is taken, yet the asportation of the property was not a commission of theft "in the presence or within the view" of the accused, so as to authorize him to arrest the deceased without a warrant.

APPEAL from the District Court of Bosque. Tried below before the Hon. J. ABBOTT.

The indictment charged that Samuel Lacy, and his son, George Lacy, the appellant, did, on April 1, 1877, murder William H. Swank, by shooting him with a gun, in the back, arm, and back of the head. Appellant was alone on trial.

The evidence discloses a somewhat peculiar state of facts. The deceased was an entire stranger to all of the witnesses who saw him in Bosque County, but, by his physical characteristics, clothing, and a singular way of talking, the testimony adduced by the State satisfied the jury that he was the man named in the indictment.

S. J. King, for the State, testified that he was sent for by Samuel Lacy to come to his house, as a man had been killed there. Witness got there between nine and ten o'clock in the forenoon, and found a dead man lying in the yard near a cabin, stretched out on his belly, but lying a little on his left side, with his right arm under him, and an old gray blanket wrapped around his head and shoulders. Sam Lacy said the body lay just as it fell. There were two wounds in the back on the left of the spine, one under the left ear, one above on the left side of the head, one on the

Statement of the case.

right arm, entering from the rear, and one on the little finger of the left hand. The shots seemed to have entered direct. A six-shooter lay about two feet to the right of the body, with the muzzle towards it. The pistol had made no indentation on the ash-bank it lay upon, though there had been a rain the preceding night. Sam Lacy met witness and told him an unfortunate occurrence had happened there that morning; that about sunrise the man had come to his house on foot, having previously been seen coming out of the brakes, riding one horse and leading another. The man left his horses where they were out of sight from the house, and walked up and asked if he could warm. Being invited in to the fire, he entered and sat down, pulled off his shoes, and after awhile asked if he could get breakfast. Mr. Lacy told him he could, and, while the man sat there and ate his breakfast, asked him where he lived and where he had been, and he said he lived in Coleman County, and had been in Bell County and was going to Coleman County. Lacy told him he was a long way out of the route from Bell to Coleman County. The man said that he was going to Meridian (in Bosque County), and that his name was Wallace. Lacy then said to him, "I will go with you to Meridian; from your appearance, and the manner you come up here, I think there is something wrong with you, and that you have stolen property in your possession." The man said, "Come on, then," and started off in the direction of his horses. Lacy told him to wait until he (Lacy) got ready, and he would go with him to Meridian, and "if you are all right with the authorities you are all right with me." The man did not stop, and Lacy told him a second time to stop; and as the man still went on, got his gun, and for the third time told him to stop. The man then stopped, and Lacy told him to come back and take a seat in the house; that he should not be hurt, but to wait until he (Lacy) got ready, and he would go with him to Meridian. The man came back until he got near the door, and there broke and ran

Statement of the case.

around the house, and he (Lacy) hobbled along after him, and, while passing the corner of the house, heard a gun fire from the opposite side of the house, and soon found that it was fired by George Lacy, though he (Mr. Lacy) did not know that George was then in the yard. The man's horses were a roan paint pony, with a bald face, and the other a sorrel horse. One of them was hobbled, and to him the other one was necked. They were about two hundred yards from the house, and a saddle was on the rock fence near them.

Other witnesses for the State gave substantially the same version of Samuel Lacy's account of the matter. One, however, added that Lacy said the man got his pistol out as he turned around the house; and another stated that Lacy showed him George Lacy's position when he fired, which was eighty feet from the body, and the two points were not in sight of each other by a foot, — owing, presumably, to the interposition of the house or cabin. This witness was a doctor, and said that the shot in the neck could not have made its exit at the wound in the back of the head, which entered the brain and killed the man; and that a shot in the brain would cause instant contraction of the muscles of the hand upon any thing therein, whereas a shot in the body would relax the muscles, and any thing in the hand would drop therefrom. Another doctor, testifying for the defence, exactly reversed this theory of the muscular effect of such wounds, and said the wound in the back of the deceased's head might have been made by the exit of the shot which entered the side of the neck. The wounds, he said, were not probed.

Among the witnesses for the defence were the mother, sister, and brother-in-law of the appellant, and a cousin of the brother-in-law, each of whom saw and heard more or less of what transpired previous to and at the moment of the homicide. George Lacy, the appellant, had, with one of these witnesses, gone out to examine the horses of the

Argument for the appellant.

deceased while the latter was in the house, and returned about the time Samuel Lacy, his father, was endeavoring to detain the deceased. Up to the time the deceased turned the corner of the house, their account of what passed between him and Samuel Lacy accords in substance with the latter's version of it to the State's witnesses. According to their testimony, George Lacy, as the deceased came round the house, stepped into a room and took a gun from a rack, stepped into the door of the room, or into the yard, and as the deceased turned the corner of the house with his pistol presented at George, the latter fired upon him with the gun. Two of the witnesses heard some one exclaim, "The man will kill George." The entire testimony denies, by implication, that any shot was fired except the one by the appellant. Doubtless the practical difficulty encountered by the defence was to explain, by the evidence, how the deceased came to be shot in the back.

The jury found the appellant guilty of murder in the second degree, and assessed his punishment at fifteen years in the penitentiary.

J. M. Maxcy and *M. D. Herring*, for the appellant. The court erred in the fifth paragraph of the charge. No complaint is made of the first part of this paragraph; but the whole, taken together, it is submitted, is on the weight of evidence. The charge says "no citizen is authorized by the law to arrest a person on suspicion,—that is, on a bare belief that an offence has been committed,—without a warrant of arrest; such citizen does so on his own responsibility, and is in law bound by the consequences of his own unlawful act."

As to whether or not the attempted arrest was unlawful depended upon a question of fact to be determined by the jury. That the deceased was a horse-thief, and had then a stolen horse in his possession at the time he was killed, and had committed a felony in Bosque County, was a question of fact for the jury. It was a charge upon the weight of

Argument for the appellant.

evidence ; it was more : it was deciding a question of fact by the court, and upon this is made to depend the question of guilt as charged in the indictment. No judge in any cause, civil or criminal, shall charge the jury on the weight of evidence, or assume particular facts to be proven. *Gray v. Burk*, 19 Texas, 228 ; *Rogers v. Broadnax*, 24 Texas, 538 ; *McFall v. Walker*, 25 Texas, 327 ; *Hunter v. Hamilton*, 28 Texas, 560.

It is true that the court excluded the testimony of the witness Messer, offered by the defendant to prove that deceased was a horse-thief, and then had Messer's horse, which he had stolen, in his possession, upon the objection of State's counsel ; to which a bill of exceptions was taken, and to which the attention of the court will be called in a subsequent part of this argument. Still, there is sufficient proof in the record to show that the man who was killed at Lacy's house had stolen Messer's horse, and was then in possession of him.

The conduct of deceased showed that he was a horse-thief. The manner of his approach to Lacy's house, leaving the highway a mile from the house and taking to the brakes, and hiding the horses in a hollow where they could not be seen, hobbling the large horse and necking the pony to him ; the place where he said he lived, when interrogated by Lacy, to wit, Coleman County, and where he had been, to wit, to Bell County ; his name given as Wallace ; his attempt to fight out of it and make his escape, and other circumstances, show that he had stolen the horse in Bell County, and having him there in his possession in Bosque County, where it was a felony as well as in Bell County ; and Lacy had the right to arrest him without a warrant, because he had and was then committing a felony in Bosque County, and yet the charge upon this point assumes that the attempted arrest was upon "suspicion or bare belief," thereby withdrawing the question from the jury, upon which depended the right to arrest.

Argument for the appellant.

The court erred in the ninth paragraph of the charge, because it assumes as a fact proven that the attempted arrest was unlawful, when that fact was for the jury to determine, under proper instructions. Nothing is left for the jury to determine as to the facts which would constitute an unlawful arrest, the facts of which was the very question which ought to have been left to the jury.

The court erred in the charge because it assumes that the defendant provoked a difficulty with the deceased, with the object in view of furnishing him a pretext for taking his life.

There was no proof before the court that the defendant, or either of them, sought or brought on a difficulty, in the sense that the law attaches to it where a party seeks to justify his acts. On the contrary, Lacy was attempting to make an arrest of a felon. The deceased had committed theft of a horse in Bell County, and had stolen property in his possession in Bosque County ; it was a felony committed in his presence in the latter county, and a citizen had the right to make the arrest and take him before the proper officer. How can it be said, then, that he brought on a difficulty, or was provoking a difficulty, and seeking to justify by reason of it?

The proof shows that the deceased was attempting to evade an arrest, even to the extent of taking life to effect his escape, as these desperate characters have often done, and have too often succeeded in doing, adding murder to the crime of horse-stealing. The charge was clearly erroneous, and misled the jury to the prejudice of the defendant. No difficulty was sought with the deceased, with the intention of killing him. The killing was not done, as the court seems to take for granted, in an attempt to make an unlawful arrest, but to make an arrest of a felon for a lawful purpose, as reasonably appears from the evidence. These charges were erroneous, and left the jury nothing to do but to find the defendant guilty.

Opinion of the court.

The court erred in refusing to allow the witness Messer to testify in behalf of the defendant, as per bill of exceptions. The facts sought to be proved were proper and competent evidence. *First*, Because it proved that the deceased was a horse-thief, and had stolen Messer's horse in Bell County on Friday night, before he was found in his possession on Sunday morning thereafter in Bosque County, and which was a felony, which justified the Lacys in attempting to make the arrest and take him before the proper officer. *Second*, It was certainly admissible in rebuttal of the evidence introduced by the State of the proof of the honesty and good character of William M. Swanks, the person alleged to have been killed. The State's witnesses, the two Fairleys and William Swanks, testified that William M. Swanks was an industrious, harmless, and honest man. As the State had put his character in issue, it was certainly competent for the defendant to introduce evidence to rebut the good character of the deceased.

It is submitted that the exclusion of this testimony was damaging to the defendant, and for this error the cause should be reversed. It was depriving the defendant of important testimony which might have changed the result.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. It is shown by bill of exceptions that the defendant placed on the stand and had sworn a witness by whom he proposed to prove that the witness had had a sorrel horse stolen from his possession and from his residence, in Bell County, on the twenty-ninth day of March, 1877, and that after the first day of April, 1877, the day on which the deceased was killed by the defendant, he, the witness, heard of his horse as having been in the possession of the deceased when he was killed; that the witness came to Bosque County, found his horse, proved his property in the animal, and took it home; and that the defendant would

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by other evidence connect the deceased with the theft of the animal; which proof the defendant was not permitted to make, the testimony being ruled out by the court on objection by the State, and the ruling saved by bill of exceptions. The view of the judge in making the ruling is expressed in the eighth paragraph of the general charge to the jury, and which is complained of as being erroneous and upon the weight of the evidence. The paragraph is as follows:—

“ You are instructed that any person who has committed a felony (and the theft of a horse is a felony) may be arrested by any citizen under the following circumstances, and no other: Where a felony is committed in the presence of a citizen, or within his view, such citizen may arrest the offender without a warrant of arrest, and he may adopt all the means necessary to effect such arrest which the law authorizes to be adopted by a sheriff or other peace-officer. But no citizen is authorized by law to arrest a person on suspicion,—that is, on the bare belief that an offence has been committed; and if a citizen attempt the arrest of a person on mere suspicion, without a warrant of arrest, such citizen does so on his own responsibility, and in law is bound by the consequences of his unlawful act.”

The ninth paragraph of the charge inculcates the same idea of the law of the defence, and instructs the jury as to the legal consequences which follow a homicide committed in an attempt at an illegal arrest.

It is not necessary that we go to the common law or to the decisions of the courts of other States in order to ascertain the circumstances under which a private person or an officer of the law may arrest for crime without warrant, for the reason that in this State the whole subject is regulated by the Constitution and the statute law. By art. 209 of the old Code of Criminal Procedure, and art. 226, Revised Code of Criminal Procedure, it is provided that a peace-officer or any other person may without warrant arrest any offender

Opinion of the court.

when the offence is committed in his presence, or within his view, if the offence is one classed as a felony, or as an "offence against the public peace." This article, and others relating to the subject of arrests, must be construed in harmony with and in subordination to the Bill of Rights, the ninth section of which declares as follows: "The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable seizures or searches, and no warrant to search any place or seize any person or thing shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

Besides art. 226, articles from 227 to 231, inclusive, are on the same subject of arrest without warrant. From the whole tenor of these articles of the Code, it is to our minds apparent that the whole authority given to arrest without warrant is founded in the law of necessity, — a necessity for prompt action in order to arrest or detain the offender, so as to prevent his escape by delaying the time necessary to procure a warrant for his arrest. The whole question here presented depends upon the proper construction and application of art. 226, copied above, and of that portion of the article which is in these words, "When the offence is committed in his presence, or within his view," as applicable to the present inquiry. It is argued with force and ability, but without authorities to support the argument, that horse-stealing is a continuing offence and a felony, and that any citizen who might see a person passing through the country and having an animal of the horse kind in possession, under such circumstances as to awaken suspicion that the animal was stolen, that then it would be within the spirit and meaning of the law which authorizes an arrest without warrant. It is true that when property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property, or in any other county through or into which he may have carried the same (Code Cr. Proc., art. 216); but

Opinion of the court.

this provision is not that a new offence has been committed, but that the offender may be prosecuted either in the county where he took the property, or through or into which he may have carried it. Hence our construction of art. 226 is, that, to entitle either a peace-officer or any other person to arrest without warrant, two things must concur: *first*, that the person sought to be arrested has committed an offence classed as a felony, or as an offence against the public peace; and, *secondly*, that the offence must have been committed in his presence, or within his view; and as to one passing through the country under suspicious circumstances, or even if common rumor had been circulated that a felony had been committed, any person, be he peace-officer or private citizen, who should attempt his arrest without warrant, would be liable to all the consequences resulting from an illegal arrest.

In the case before us there is no pretence that the defendant, or any other person acting with him, was clothed with a warrant for the arrest of the deceased. We are therefore of opinion that the court, in the paragraph of the charge copied above, gave to the jury a charge applicable to the facts proved, and substantially correct in law, and that the testimony excluded was irrelevant and inadmissible under the law, as the testimony developed the defence.

We find no error in the charge to the prejudice of the defendant. The various instructions given to the jury, though perhaps more voluminous than necessary to give the jury the law arising upon the facts proved, are believed to be sufficiently expressed to submit to the jury the material points of inquiry. We cannot say that there was not a sufficient amount of legal testimony to warrant the jury in their finding, either as to the guilt of the defendant or the identity of the person killed with the person named in the indictment.

The sufficiency of the verdict is called in question, and a photographic copy is attached to the transcript; but this is

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not identified as any part of the record, so as to entitle it to consideration. There is no objection to the form of the verdict as recorded on the minutes of the court. Verdicts are not subject to strict rules of interpretation ; so they are intelligible, the law is satisfied.

After a careful examination of the whole case as made by the record, in the light of able oral argument and brief by counsel for the appellant, we find no such error as required the granting of a new trial in the court below, or as would warrant a reversal of the judgment ; and it is affirmed.

Affirmed.

ALF SMITH v. THE STATE.

1. **CHARGE OF THE COURT.** — If the law applicable to every legitimate deduction which the jury may draw from the evidence be given to the jury, the charge is sufficient, and the duty of the court discharged in this respect.
2. **FACT CASE.** — See evidence held sufficient to support a conviction for murder in the first degree.
3. **PENALTY.** — Within the limits prescribed by law, the amount of the punishment is for the consideration of the jury, and not for that of the court.

APPEAL from the District Court of Robertson. Tried below before the Hon. S. FORD.

The deceased was named Matt Wilson, and was killed by the appellant on April 15, 1870, shortly after the Constitution of 1869 took effect, and empowered juries to substitute confinement in the penitentiary at hard labor for life, in lieu of the death-penalty.

The testimony was unusually brief, consistent, and conclusive, as will be seen from the recapitulation of it in the opinion.

F. H. Prendergast, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

Opinion of the court.

WINKLER, J. The appellant was indicted at the May term, 1878, of the District Court of Robertson County, for the murder of Matt Wilson, alleged to have been committed on April 15, 1870; and on a trial in the same court on June 10, 1879, was convicted of murder in the first degree, and his punishment assessed at confinement in the State penitentiary for the term of his natural life. A motion for a new trial was made and overruled, and this appeal is prosecuted, on the following assignment of errors: 1. The court erred in not charging the law of manslaughter. 2. The court erred in not granting a new trial: *first*, because the verdict of the jury is for murder in the first degree, when there was no evidence of express malice; *second*, because the verdict of the jury is not supported by the evidence; *third*, the punishment is excessive.

With regard to the error complained of, that the court erred in not charging the law of manslaughter, we deem it sufficient to say that, from the evidence as set out in the statement of facts, there was no testimony warranting a charge on the subject of manslaughter; there was no evidence that the life of the deceased was taken under circumstances such as would reduce the homicide to that grade of killing, or to any grade lower than murder in the second degree, as to which the jury were instructed. The rule of law is well settled that it is the duty of the judge to instruct the jury as to the law applicable to every legitimate view they might take of the testimony adduced on the trial; and this, we are of opinion, was done by the charge of the court in the present case.

The second error assigned relates mainly to the sufficiency of the evidence to support the verdict and judgment for murder in the first degree, and that the punishment is excessive. It was proved on the trial that the deceased and three others were engaged in a game of cards, when the defendant came up and interfered with and broke up the game. At this time the defendant was armed with a pis-

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tol; the deceased, who was unarmed, tried to get a pistol from a by-stander, but did not succeed. A witness states that the game was broken up and the crowd dispersed. The defendant and one Smith started off together; the deceased and others followed on, and then, the witness says, the defendant told the deceased not to come any further; told him so three times, and then he wheeled around and levelled his pistol on the deceased and shot him. The ball entered his forehead, and he fell; lived until the next evening, and never spoke after he was shot. The deceased was an old man.

Another witness, when speaking as to the game of cards, says the defendant and another came up, and the defendant interfered in the game and cursed the deceased. An angry altercation seems to have ensued, the defendant being armed with a pistol, and the deceased endeavoring to get a pistol, but failing; when, this witness says, he took the deceased off and pacified him. He said he was satisfied, and the witness turned him loose. The defendant and his comrade had then started off; the deceased, witness, and others also started home, went around the house toward the road, and following on after the defendant, but the witness says the deceased was not going directly towards the defendant, but quartering from him in the direction of his route. The deceased said to the defendant, "My son, I would not have thought you would have abused an old man as you did me." The defendant then began cursing, and deceased advanced towards him; the defendant said, "Don't you come any further," and repeated it several times. Defendant then drew his pistol and presented it at deceased, and fired; struck deceased in the forehead, and he fell, and never spoke. The witnesses all agree that the deceased was unarmed during the entire time from the first interruption until the fatal shot was fired, and that throughout the defendant seemed to be at fault and the aggressor.

Under the circumstances, we are of the opinion the con-

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duct of the defendant manifested such a violent and malignant disposition as to require the judge to submit to the jury the issue of murder in the first degree. *Duebbe v. The State*, 1 Texas Ct. App. 159, and authorities there cited. And the jury having found the facts sufficient to warrant a conviction of that degree of murder, we cannot say that the testimony does not sustain the verdict as a killing on express malice, and murder in the first degree, or that the verdict of the jury is not supported by the testimony. As to the complaint that the punishment is excessive, we deem it only necessary to say that the punishment for murder in the first degree is fixed by law, and with the amount of the punishment the courts have no concern.

The appellant, so far as we are able to determine from the record and briefs, has been tried on a valid indictment, under appropriate instructions from the court to the jury, which presented the law substantially of the case as proved on the trial, and that the testimony is sufficient to support the verdict and judgment; and finding no material error in the proceedings, the judgment of the District Court is affirmed.

Affirmed.

J. A. LEONARD v. THE STATE.

1. **EMBEZZLEMENT.** — INDICTMENT for embezzlement need not allege that the embezzled property was taken with the intent to deprive the owner of it or its value, and appropriate it to the taker's benefit.
2. **SAME.** — Indictment for embezzlement described the owner as "the First National Bank of Fort Worth, an incorporated company, then and there duly and legally established, organized, and existing under and by virtue of the laws of the United States, as an incorporated company." *Held*, a sufficient description and designation of the owner.
3. **VARIANCE.** — In support of the allegation that certain cotton was the property of "the First National Bank of Fort Worth," the court below admitted certain receipts therefor made by the defendant, which designated the owner as "1st Nat. Bank," and allowed the State to prove by a wit-

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ness that these latter words meant and were intended to mean the First National Bank of Fort Worth. *Held*, that the testimony was admissible, and obviated the objection of variance between the allegation in the indictment and the designation in the receipts.

4. **EVIDENCE.** — In the trial of an alleged bailee for embezzlement of his bailor's property, it was competent for the State to prove the terms of the contract of bailment, by virtue of which the property went into the defendant's possession.
5. **SAME.** — At the trial of the keeper of a cotton-yard for embezzling twenty bales belonging to a certain bank, it was in proof for the defence that he absconded, leaving a much larger number of bales in his yard, which belonged to different owners; and the court below allowed the State to prove by owners of such cotton the number of bales they had in the yard, and how many they recovered therefrom after the flight of the defendant. *Held*, that the testimony was competent in connection with the antecedent evidence, and to show that the cotton left on hand by the defendant did not comprise the twenty bales mentioned in the indictment.
6. **BURDEN OF PROOF—CHARGE OF THE COURT.** — With reference to such proof, the court below instructed the jury that "when facts have been proved which constitute the offence, it devolves on the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or omission." *Held*, in view of the proof referred to, and of the charge as an entirety, that the instruction, even if unnecessary, was not error.
7. **OWNERSHIP.** — In a prosecution for embezzlement, it suffices to prove a qualified ownership in the alleged owner of the property appropriated by the defendant, and that such owner had the right to the possession and control of it.
8. **SAME—ULTRA VIRES.** — In defence to an indictment for embezzlement of cotton alleged to belong to a national bank, it is urged that the national-banking law disables such banks from owning personal property or taking mortgages or liens thereon, and therefore the alleged ownership was an impossibility, incapable of proof. But *held*, that the doctrine of *ultra vires* cannot thus avail as a defence in cases of theft, embezzlement, and the like.

ON MOTION FOR REHEARING.

1. **EMBEZZLEMENT.** — The statutory offence of embezzlement originated in a necessity which resulted from the inapplicability of the common law of larceny to breaches of trust by persons occupying fiduciary relations. All authorities treat it as akin to larceny, and the Code of this State affixes the same penalty to it and to that offence. Concisely defined, it is the fraudulent appropriation of another's personal property by one to whom it had been intrusted.
2. **SAME—CONVERSION.** — The fraudulent conversion may be consummated in any manner capable of effecting it; and its commission is a question of fact, and not of pleading, when the indictment charges that the defendant did embezzle, fraudulently misapply, and convert to his own use the property entrusted to him.

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3. **SAME.** — Conversion of a bailment by a bailee may be effected by a sale, whether he was or was not authorized to sell it; but if he was authorized to sell it, and did sell it with the then intention to pay over the proceeds to the bailor, but afterwards conceived the fraudulent purpose and converted the proceeds to his own use, he is not guilty of embezzlement of the property so sold. *Per contra*, notwithstanding his authority to sell, if he made the sale as a means of converting the property to his own use, and did so convert it, his offence is embezzlement.
4. **ALLEGATA ET PROBATA.** — Indictment alleged that the defendant was a bailee of certain cotton "for hire, to wit, for the sum of fifty cents per bale;" and the State adduced his receipts, which showed that such was his charge. He introduced testimony that in fact his charge was only thirty-five cents per bale, and that his receipts were intended to deceive his competitors as to his charge. *Held*, that the material allegation was that he was a bailee for hire, and not the exact rate of his charges; and that, besides other satisfactory evidence, his receipts were conclusive against him in proof of the allegation.
5. **DEMAND.** — To constitute embezzlement, it is not necessary that a demand was made on the defendant for the property intrusted to him; nor could one be expected when he absconded without notice and left no agent amenable to a demand. The fraudulent conversion may be inferred from facts; and flight, concealment, and evasion are strong evidences of the fraud.
6. **INTERPRETATION OF THE CODES.** — The Code of Criminal Procedure provides that "a defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, and, in case of reasonable doubt as to his guilt, he is entitled to be acquitted" (Rev. Code Cr. Proc., art. 727); and the Penal Code provides that, "on the trial of any criminal action, when the facts have been proved which constitute the offence, it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or omission" (Rev. Penal Code, art. 51). *Held*, that there is no inconsistency between these provisions, nor in the many decisions wherein they have been construed. Note the commentary on them in the opinion, and the reference to the leading but unreported case of *Hall v. The State*.
7. **SAME — CHARGE OF THE COURT.** — When, as in the present case, all exculpatory evidence, if any existed, was peculiarly accessible to the defendant, it was proper and requisite to give in charge to the jury the provision of the Penal Code above quoted; and, in view of the evidence, the instruction did not shift the burden of proof from the State to the defendant.

APPEAL from the District Court of Tarrant. Tried below before the Hon. A. J. HOOD.

The *gravamen* of the indictment is set out in the opinion originally rendered in this well-contested and instructive

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case; and in that and the opinion delivered on the motion for a rehearing the leading facts underlying the rulings are indicated. The most material of the testimony, however, may be useful.

M. B. Loyd, for the State, testified that ever since the organization of the First National Bank of Fort Worth, as authorized by virtue of the certificate of the United States comptroller of the currency, dated March 21, 1877, and which he identified, he had been the president and C. H. Higbee the cashier of the bank, and they had transacted about all its business. On December 1, 1877, Joseph A. Leonard, the defendant, was, and for some months previous had been, engaged in the business of keeping a cotton-yard in the city of Fort Worth, and the said bank had some cotton transactions with him. A number of receipts, partly in print and partly in writing, were identified by the witness as cotton-receipts held by said bank for cotton stored in the defendant's yard. The bank held the cotton by virtue of these receipts, having paid the money, for the cotton represented by them, to any party who presented a check from Leatherwood, a cotton-buyer, with the defendant's storage-receipt attached to the check. The bank did not buy any cotton, nor was any cotton delivered to the defendant by it or its officers. It was only by the receipts that the witness could identify the cotton mentioned in the indictment, and only by the balance due the bank from Leatherwood (a buyer who operated in connection with the defendant) that he knew the deficit of the defendant in the amount of cotton represented by the receipts.

J. D. Jeffries, for the State, testified that he was the defendant's book-keeper and cashier from August, 1877, to December of the same year, the time of the "break-up," when the defendant left. The cotton-receipts shown to the previous witness were identified by this witness as the receipts of the defendant, whose signatures were signed by witness to them and to the indorsements thereon, with the

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knowledge and by order of the defendant. Each of these receipts represented a bale of cotton of the description and weight set forth in the receipt; and the cotton so represented was received in the defendant's yard at the date of the corresponding receipt. Whoever held the receipt had a right to the bale of cotton it represented. The indorsement on each of these receipts, viz.: "Held subject to the order of 1st Nat. Bank upon return of this receipt," was not put on the defendant's receipts in general, but only on those for which the bank paid the money; and the words, "1st Nat. Bank," mean "the First National Bank of Fort Worth." What became of the cotton represented by these receipts held by the bank the witness did not know. Leatherwood and three others were buying cotton for the defendant. On December 1, 1877, the defendant left, and his cotton-yard closed. Witness did not know where the defendant went to, and saw him no more until the fall of 1878. Just before he left, he sold to G. T. Potter, by classification, about one hundred bales in marks not known to witness. There was on the yard, when the defendant left, some cotton marked BOB (in which mark eight of the missing bales appear by the receipt); and Potter's cotton was on the yard when defendant left, but whether the latter included the former, the witness does not state; nor could he say whether any of the receipts identified as the bank's were returned, or that the corresponding cotton had ever been delivered to any one. Witness never knew of any cotton being delivered from the yard without a return of the receipts; and no order from the bank about the cotton represented by the receipts it held was received by him, or, so far as he knew, by the defendant. The fifty cents charge noted in the receipts was for storage, but the real charge made was thirty-five cents; the fifty cents was put in the receipts to show to other cotton-yard keepers. The charges had to be paid when the cotton was taken out of the yard. Defendant and Leatherwood agreed to buy

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cotton and divide the profits; the defendant gave Leatherwood \$1,000 to put up as a margin, and Leatherwood made an arrangement with the First National Bank to pay the checks, Leatherwood paying the storage. Including the cotton sold to Potter, there were more than one hundred and fifty bales on the yard when the defendant left.

In connection with this testimony the State put in evidence the receipts held by the bank, each of which bore the signature of the defendant, and purported the delivery to him on a certain day, by W. S. Leatherwood (except two by A. G. Wood), of one bale of cotton, in a designated mark, and of a stated weight and number; which bale, by stipulation on the margin, was "to be delivered on return of this receipt." Each receipt bore, over the defendant's signature, the indorsement, "Held subject to order of 1st Nat. Bank on return of this receipt."

John Nichols, president of the City National Bank of Fort Worth, testifying for the prosecution, stated that on December 1, 1877, the defendant owed that bank \$2,335 for advances on cotton, and witness told him it must be settled. On that day the defendant and G. T. Potter came to the bank, and the latter checked on it for \$5,000 in favor of the defendant; and the bank, on cashing the check, deducted from its amount the indebtedness of the defendant and paid him the balance. The check was given by Potter for cotton sold him by the defendant; and the latter, on receiving the balance paid him by the bank, absconded, and was afterwards brought back in arrest. The bank, on thus collecting its dues from the defendant, at his request transferred to Potter the cotton-receipts it held for the amount which the defendant had been indebted to it.

M. B. Loyd, recalled by the State, testified that the defendant, when he left the country, was short to the First National Bank of Fort Worth not less than ten bales of cotton, represented by the receipts in evidence, and worth at least \$40 per bale. The indorsement on the receipts

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was put there in accordance with an arrangement between the bank and the defendant, and in order to hold him directly responsible to the bank for the safe-keeping of the cotton. Witness never authorized him to dispose of the cotton in any manner. The bank had no other connection with him except as a warehouseman; and he never accounted to the bank for the cotton represented by the receipts in evidence. On cross-examination, the witness stated that the cotton-buyer would check on the bank for the price of the cotton, attaching to his check the receipt of the defendant, showing that the cotton was in his yard. Leatherwood, whose name appears in most of the receipts, put with the bank a margin of \$1,000 to secure it against loss by a fall in the cotton-market. The bank paid the money to those from whom he bought the cotton, and held it as collateral security, paying no storage on it. Witness, when he heard that the defendant had absconded, took the receipts to the cotton-yard, and had a man to examine the cotton still there for any of the Leatherwood cotton, and only five or seven bales of it were found, and they were reclaimed for the bank. Some weeks before the defendant left, he brought \$2,000 to the bank, and with it took up Leatherwood's receipts to that amount. Witness supposed the defendant got the money by selling the cotton. Both the defendant and Leatherwood were requested by witness to find a purchaser for the cotton represented by the receipts held by the bank; but witness did not remember telling Jeffries that he (the witness) wanted the defendant to sell the cotton.

J. M. Henderson, sheriff of Tarrant County, testifying for the prosecution, stated that about December 1, 1877, he made diligent search in that county for the defendant, and failed to find him. In July, 1878, witness arrested the defendant in San Antonio, where he was passing under the name of W. L. Smith.

C. H. Higbee, cashier of the First National Bank of

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Fort Worth, testified for the State. His evidence is, in substance, included in that of Mr. Loyd.

By J. Samuels and A. Mandlebaum the State proved that when the defendant absconded they went to his cotton-yard to get cotton for which they held his receipts. Samuels got none of the eleven bales to which his firm was entitled; Mandlebaum got sixteen out of fifty-one, and left no cotton on the yard.

For the defence, J. S. Jeffries testified that he was employed by defendant to receive and weigh the cotton stored in the latter's yard, from August 1, 1877, to December 1 of the same year. Neither the First National Bank of Fort Worth, nor any of its officers, ever delivered any cotton there. On the last Tuesday of November, 1877, Mr. Loyd, president of the said bank, came to the yard, and told Leatherwood and the defendant that he wanted them to sell the cotton and close up Leatherwood's account. The next day Loyd came again, and told witness to tell the defendant that he (Loyd) wanted the cotton sold and the Leatherwood account closed; and witness told the defendant what Loyd said. Mr. Higbee, the cashier, came down the same week, and said he wanted them to sell the cotton. The Leatherwood cotton was bought by Leatherwood, and came to the yard as his cotton. He and the defendant had an agreement that they would put up \$1,000 as a margin, and Leatherwood was to buy cotton and store it in defendant's yard, and they were to divide profits. Defendant was to control and sell the cotton. On December 1, when the defendant left, there were over one hundred and eighty bales on the yard; of which Potter took one hundred and nineteen, Mordecai thirty or forty, Mandlebaum & Etheridge sixteen, Forsythe two or three, and Gibbons some. There was considerable excitement, and witness could not control the cotton. The last that witness saw of the defendant, the latter was going to the City National Bank. Neither witness nor his family, though defendant was his

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son-in-law, knew where he went to when he left. On his cross-examination, the witness recognized the receipts in evidence, and verified the weights and description of the bales mentioned therein. The defendant knew of the receipt of those bales, and the receipts were signed with his name by his authority. The indorsements were put on the receipts by the defendant's order. Whoever held one of the receipts, and came by it honestly, owned the cotton described in it. Witness did not pretend to say that all the cotton described in the receipts was on the yard when the defendant left, but there was some of the Leatherwood cotton there.

J. D. Jeffries, for the defence, stated that the sale by the defendant to Potter was for one hundred bales, and that the Leatherwood cotton was delivered at the yard by Leatherwood, and not by the First National Bank of Fort Worth.

M. B. Loyd, recalled by the State in rebuttal, denied that he ever authorized the defendant to sell the cotton described in the receipts held by the bank, but only authorized him to negotiate a sale or find a purchaser for it; nor did he remember sending word to the defendant, by J. S. Jeffries, to sell it.

The record contains seven bills of exception, covering ten pages, reserved by the defence; but they, and all other matters immediately involved in the rulings made, are sufficiently noticed in the opinions. The jury found the defendant guilty, and assessed his punishment at five years in the penitentiary.

R. E. Cowart and *Hughes & Watts*, for the appellant. The court erred in overruling the defendant's motion to quash the indictment, for the several grounds and reasons shown by said motion. For it was not charged in said indictment that said First National Bank of Fort Worth carried on or did business as such in Tarrant County, State of Texas, or elsewhere in said State; which is a necessary averment.

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The charge in the indictment is, “that the First National Bank of Fort Worth, an incorporated company, then and there duly and legally established, organized, and existing under and by virtue of the laws of the United States as an incorporated company,” etc. See *Corley v. The State*, 54 Ga. —, and authorities there cited; *Coats v. The People*, 22 N. Y. 245.

For that it is not charged in said indictment that any demand was ever made upon appellant to deliver said cotton to said bank, nor is it therein shown why such demand was not made; all of which is necessary and requisite.

There is no demand for the cotton shown in the indictment, or any refusal to deliver upon the part of the defendant. *The State v. West*, 10 Texas, 554; *Wright v. The People*, 61 Ill. 382; 2 Green’s Cr. Rep. 558.

For that it is charged in said indictment, in substance, that said cotton came first into the possession of said bank, and was by said bank intrusted to appellant; whereas the law is that, to constitute embezzlement, the property must go into the possession of the bailee from some other person than the bailor. 2 Bishop’s Cr. Law, sects. 352, 357; Whart. Cr. Law, sect. 1941.

Said indictment charges that said “First National Bank of Fort Worth” was a corporation existing under and by virtue of the laws of the United States, and that said cotton was funds of said bank, and that appellant was an agent of said bank; and therefore said offence charged against appellant was cognizable alone by the courts of the United States, and not by the courts of the State of Texas. See Rev. Stats. U. S. 1013, sect. 5209; 1 Whart. Cr. Law (7th ed.), sects. 184, 194; *The Commonwealth v. Tenney*, 97 Mass. 56; *The Commonwealth v. Felton*, 101 Mass. 204; *The People v. Kelley*, 38 Cal. 145; *The State v. Adams*, 4 Blackf. 146; *The State v. Pike*, 15 N. H. 83.

National banks cannot own or deal in cotton, nor hold the same as collateral security; and the contract of bailment

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charged in said indictment is *ultra vires*, and therefore void. See Rev. Stats. U. S., sect. 5136, par. 7; Green's Brice's *Ultra Vires*, 623, 625, note; *Weckler v. First National Bank of Hagerstown*, 42 Md. 581; *Fowler v. Sculley*, 72 Pa. St. 456; *National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278.

The State, over objection of appellant, was allowed to introduce as evidence the certificate of the comptroller of currency, and also proof of independent and other purported acts of embezzlement. This was error. See Rev. Stats. 332, 335, chap. 4, tit. 38; *The Commonwealth v. Shepherd*; 1 Allen, 575.

The court erred in refusing to give the charges asked by the defendant; for if the title and ownership of the cotton was not in "the First National Bank of Fort Worth" at the time it was charged to have been converted by defendant, then he could not be legally convicted under the indictment, which charges that the title and ownership was in said bank at the time. Again, if the bank only held the cotton as collateral security, then if the defendant sold the same he was not guilty of embezzlement, but might have been guilty of fraudulently selling personal property subject to a lien. And again, if the defendant was authorized to sell the cotton by the bank, and he did sell the same, and converted the money arising from such sales to his own use, then he was not guilty of embezzling the cotton.

The evidence showed that the title and ownership of the cotton was not in the bank, but that it was owned by appellant and Leatherwood; that the bank claimed to hold said receipts and cotton as collateral security. Therefore appellant asked the court to charge the jury that if the said bank held said cotton as collateral security, or that the title and ownership of said cotton was not in said bank at the time the same is charged to have been embezzled, then for the jury to acquit. This charge was refused by the court. See Gen. Laws 1876, p. 9; *Griffin v. The State*, 4 Texas

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Ct. App. 390; *The State v. Kent*, 21 Am. Rep. 764, 767; 22 Me. 41.

If the bank was not the owner of this cotton, but held said receipts and claimed said cotton as collateral security, and the defendant sold the cotton and converted the proceeds to his own use, he is not guilty of embezzlement, but might, upon proper proof, have been guilty of selling personal property subject to a lien. See Gen. Laws 1876, p. 9; Penal Code, art. 797; *The State v. Kent*, 21 Am. Rep. 764, 765; Rev. Stats. U. S., sect. 5136.

If the defendant was authorized by the bank to sell the cotton, and did sell the same and convert the money arising therefrom to his own use, he is not guilty of embezzling the cotton. Gen. Laws 1876, p. 9; *Baker v. The State*, 6 Texas Ct. App. 346.

The court erred in the charge to the jury in this: that the court tells the jury that when the facts have been proven which constitute the offence, it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or omission; for that the court, in giving such charge, assumes that the facts constituting the offence charged in the case had been proven; and in giving said charge the court led the jury to believe that the court thought the defendant's guilt was established. And again, the court, by said charge, changed the burden of proof from the State to the defendant, and otherwise misled the jury; and also thereby deprived the defendant of the benefit of the reasonable doubt upon all the evidence introduced upon the trial of the cause.

The appellant entered the plea of not guilty, and did not admit any thing; testimony was introduced both by the State and the appellant; in fact, the latter contested every proposition relied upon by the State to secure a conviction, as will appear from the record. Notwithstanding, the court, immediately after giving charge upon the presumption of innocence and reasonable doubt, followed the same with

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said charge. Code Cr. Proc., art. 727; *Shanks v. The State*, 25 Texas (Supp.), 340; *Dorsey v. The State*, 34 Texas, 651; *Delany v. The State*, 41 Texas, 601; *Walker v. The State*, 42 Texas, 340; *Hall v. The State*, Galveston term, 1875; *Perry v. The State*, 44 Texas, 478; *Chapman v. The State*, 1 Texas Ct. App. 728; *Chaffee v. United States*, 18 Wall. 516; 1 Whart. Cr. Law, 707; *The State v. Wing*, 27 Am. Rep. 329, and the authorities there cited.

The court erred in its charge in this: that the court in effect tells the jury that if the cotton was in store, and in the care of the defendant Leonard, and the owner of the cotton transferred to the bank Leonard's receipt as cotton-yard keeper, as and for collateral security, and that this transfer was made with the sanction of the defendant, then that the defendant instantly became the bailee of the bank, and might be indicted and convicted as such for the embezzlement of the cotton, etc.

It was charged in the indictment that the said cotton was the corporeal personal property of said bank. The proof showed that the bank held the receipt of appellant for said cotton as collateral security, and the proof showed that the bank never paid appellant one cent for keeping the cotton, and never agreed to pay him one cent therefor. Gen. Laws 1875, p. 9; *Perkins v. Sterne*, 23 Texas, 563, and authorities cited; *Griffin v. The State*, 4 Texas Ct. App. 390; *Robinson v. The State*, 5 Texas Ct. App. 220; Tyler on Usury, 508 *et seq.*; Gen. Laws 1874, p. 153; *Lucketts v. Townsend*, 3 Texas, 131; *Warrington v. The State*, 1 Texas Ct. App. 168.

The court erred in charging the jury, "that if the defendant sold the cotton by authority of the bank, *without a fraudulent intent*, he could not be convicted." The same is misleading and erroneous in this: that it makes the *intent material*, when the law is that if the defendant sold the cotton under the authority of the bank, regardless of his intent he could not be convicted for embezzling the cotton,

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but might probably have been guilty of embezzling the proceeds of the cotton, or the theft thereof.

There was evidence tending to show that the bank officers had authorized and requested the defendant to sell said cotton. Upon this the court gave the said charge. Gen. Laws 1876, p. 9; Penal Code, art. 727; *Griffin v. The State*, 4 Texas Ct. App. 390; *Robinson v. The State*, 5 Texas Ct. App. 520; *Baker v. The State*, 6 Texas Ct. App. 344.

Thomas Ball, Assistant Attorney-General, for the State.

1. The case of *Coats v. The People*, 22 N. Y. 245, cited by the appellant on the sufficiency of the indictment, turned on the word "private" which precedes the words "persons or corporations" in the statute of that State, which in this respect differs greatly from the law of this State. Penal Code, arts. 786, 787; Acts 1876, p. 9. Upon the sufficiency of the indictment, see *Wise v. The State*, 41 Texas, 139.

A fraudulent conversion to the defendant's own use is embezzlement, whether a demand was made or not; and therefore a demand need neither be averred nor proved. *The Commonwealth v. Hussey*, 111 Mass. 432; *The Commonwealth v. Tuckerman*, 10 Gray, 173.

It makes no difference from whose possession the bailee received the property alleged to have been embezzled. 2 Bishop's Cr. Law, sect. 372; *Henderson v. The State*, 1 Texas Ct. App. 432; *Baker v. The State*, 6 Texas Ct. App. 344.

While it may be true that the United States courts have jurisdiction to try a person prosecuted for embezzlement from a national bank, yet the same act is an offence against the Penal Code of Texas; and the State courts have jurisdiction of an offence against the State laws, although it be embezzlement from a national bank. *The Commonwealth v. Barry*, 116 Mass. 1; *The State v. Fuller*, 34 Conn. 280; *The State v. Haskell*, 33 Me. 127.

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Whether national banks can hold personal or even real property, or can hold the same as collateral security, are questions which cannot arise in this case, but questions over which the authority which created those corporations has complete control and jurisdiction. If a bank were to violate its charter, it might be sufficient for the proper authority to take away its charter; but even then the rights it has acquired, either directly or collaterally, cannot be inquired into in a proceeding of this kind.

2. The general charge of the court below is sufficient as to the ownership of the bank in the cotton, and its refusal to give the charge asked by the defendant was clearly right. That special charge is clearly against the law, in the part which says "that, if the bank held the cotton as collateral security, then if the defendant sold the same he was not guilty of embezzlement." Whether the bank held the cotton absolutely in its own right, or in a right collateral to some other right of property, so that it had a qualified property in the cotton, it is sufficient to sustain the prosecution. *The Commonwealth v. Buttrick*, 100 Mass. 1. And see *Riley v. The State*, 32 Texas, 763, though overruled by *Griffin v. The State*, 4 Texas Ct. App. 412, in so far as it holds that an indictment for embezzlement will support a conviction on proof of theft.

The remainder of the charge asked by the defendant was in substance given in the main charge, and therefore its refusal was not prejudicial to any of the defendant's rights. While the part of the charge complained of might, if isolated and alone, have been error, yet if the remainder of the charge, coupled with the objectionable part, left to the jury the right to consider the degree of weight to be attached to the facts referred to in the charge, and no exception was taken to the charge at the time, it is not material error when it was not calculated to injure the rights of the defendant. *Parrish v. The State*, 45 Texas, 51.

In a case such as this at bar, when the act is proved which

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constitutes the offence, and nothing in the State's evidence shows that the defendant had the right to use the cotton, the offence is complete and well made out, and it devolves on the defendant to show by evidence his right to use it, inasmuch as he is presumed to know best the reason why he used the property of another. The instruction in the present case, therefore, was not objectionable when taken in connection with the entire charge. This case is very different from *Delany v. The State*, 41 Texas, 601, where the instruction here objected to was held error. If, at the time the defendant appropriated or used the cotton, he intended and had the means to make it good, it was embezzlement. *The Commonwealth v. Tuckerman*, 10 Gray, 173; *The Commonwealth v. Mason*, 105 Mass. 163. Applying the rule thus laid down in these cases to the instruction so much objected to by the appellant, there is no error; because the proof of the bare fact of conversion without the owner's consent made out a clear case of embezzlement, and the charge could not and did not operate to the defendant's injury.

No exception to the charge of the court is presented by bill of exceptions, as required by law. The refusal to give a requested charge does not operate as a bill of exceptions; and this court should not review or in any way examine the charge of the court, as there is nothing before this court to show that the defendant was in any respect dissatisfied with the charge when it was given. Pasc. Dig., art. 3068; Code Cr. Proc., art. 686; *Robinson v. The State*, 24 Texas, 154; *Scott v. The State*, 25 Texas (Supp.), 168; *Williams v. The State*, 41 Texas, 209.

Unless the statute expressly authorized a defendant to have the charge reviewed on appeal, without bills of exception, the court will not review it; for, in the absence of a statute prescribing the mode of procedure, the common-law rule controls, and under it no charge of the court was reviewed on appeal unless the defect was pointed out by bill of exceptions. Code Cr. Proc., art. 27.

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The object of the requirement that judges shall give their charges in writing, and sign them, is not to substitute the written charge for a bill of exceptions, but to authenticate the charge so as to compel the judge to sign a bill of exceptions taken to any portion of it.

As to the exception taken to the admission in evidence of the certificate of the United States comptroller of the currency, over objection by the defendant, the court below committed no error; for the courts take judicial notice of the national seal of another nation. 1 Greenl. on Ev., sect. 6. And as the acts of Congress are law of the land, there was no necessity to introduce them in evidence. But suppose the certificate was improperly admitted, no wrong was done the defendant; because, without objection on his part, the existence of the First National Bank of Fort Worth had already been shown by parol, and that was sufficient. *The People v. Barric*, 49 Cal. 342.

With reference to the other exceptions reserved to the rulings on the evidence, it need only be remarked that the other acts of embezzlement were correctly admitted for the purpose of showing the guilty motive of the defendant in the commission of the act for which he was being prosecuted. 1 Allen, 575; 10 Gray, 173; *Dill v. The State*, 1 Texas Ct. App. 278; *Street v. The State*, ante, p. 5.

WINKLER, J. This appeal is from a verdict and judgment of conviction on a charge of embezzlement of twenty bales of cotton alleged to belong to the First National Bank of Fort Worth, which, the indictment avers, were placed in the possession of the appellant as bailee, the appellant being the keeper of a cotton-yard in the city of Fort Worth, Tarrant County.

The principal grounds relied on for reversal of the judgment are: *first*, the insufficiency of the indictment; *second*, alleged error in admitting testimony against the defendant on the trial below, over his objections, and to the admission

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of which bills of exceptions were saved by the defendant's counsel; *third*, supposed error in the refusal of the court to give to the jury certain special instructions asked by the defendant's counsel; *fourth*, supposed error in the general charge of the court; *fifth*, the refusal of the court below to grant the defendant a new trial.

The grounds of the motion to quash the indictment may be condensed into the following: That the indictment does not state that the cotton was ever ordered by the owner thereof to be returned to the owner, or that the receipt of the defendant was ever returned to the defendant, or that any demand was ever made of said cotton, or any payment was ever made, or tender of the yard-keeper's fees, or any reason given for not having done so; that it is not alleged that the defendant ever received the cotton as bailee of the owner; that the cotton-yard keeper is not such bailee in contemplation of law; and it is not alleged that the cotton was embezzled with a fraudulent intent to deprive the owner of the cotton of its value, or to appropriate it to the benefit of the defendant; that there is no sufficient description of the cotton, nor is the character of the bailment sufficiently averred, nor is the act of conversion sufficiently described; because it is alleged that the defendant was part owner of the cotton; that the indictment charges no offence against the law; and because the bank is a foreign corporation, and the indictment does not allege that it does business in Texas by authority of the laws of the State.

In order to see the applicability of the exceptions to the indictment, we set out so much of it as is necessary for that purpose. The indictment charges: "That the 'First National Bank of Fort Worth,' an incorporated company then and there duly and legally established, organized, and existing under and by virtue of the laws of the United States as an incorporated company, did, on the first day of December, A. D. 1877, deliver and intrust to the care and possession of, for storage and safe-keeping, to one Joseph

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Leonard, the said Leonard being then and there the keeper of a cotton-yard, and doing business as the keeper and bailee of cotton for storage for hire, twenty bales of lint cotton, of the value of fifty dollars per bale, being then and there corporeal personal property of the 'First National Bank of Fort Worth,' to be stored and kept safely by the said Leonard for hire, to wit, for the sum of fifty cents per bale, and to be held by said Leonard subject to the order of the 'First National Bank of Fort Worth,' on the return of the said Leonard's receipts for the same, and that the said Joseph Leonard did, by virtue of his said employment of cotton-yard keeper and bailee, and while he was so employed as aforesaid, take into his possession said twenty bales of cotton, to be held and kept as aforesaid, and that the said Joseph Leonard, cotton-yard keeper and bailee as aforesaid, afterwards, to wit, on the second day of December in the year of our Lord one thousand eight hundred and seventy-seven, in said county and State, and before said cotton so delivered to him as aforesaid was by the said the 'First National Bank of Fort Worth' ordered to be delivered to any one, or returned to said bank, and before said cotton was by said bank ordered to be disposed of in any manner, did embezzle, fraudulently misapply, and convert to his own use, without the consent of the said the 'First National Bank of Fort Worth,' the said twenty bales of lint cotton held by him as bailee as aforesaid; contrary to the statute and against," etc.

It will readily appear from the face of the indictment that it contradicts many of the objections taken to it by the defendant. It is no part of the description of the offence of embezzlement that the indictment should allege, as in theft, that it was taken with the intent to deprive the owner of the property or its value, and to appropriate it to the benefit of the taker. The indictment alleges the property to have been in the possession of the defendant, which would to some extent excuse the pleader from a

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more minute description; still we are of opinion it was sufficiently described for the purposes of this prosecution, to apprise the defendant as to what he was charged with.

With regard to the objection to the description of the bank, we are of opinion it was not well taken. In *Price v. The State*, 41 Texas, 215, where the defendant was indicted for theft of a bale of cotton, it was objected that the proper name of the owner, the H. & T. C. R. W. Company, was not properly set out. The court say: "It was not necessary to set out the charter in the indictment, or to allege it to be a chartered company otherwise than by name." Citing Archb. Cr. Pr. & Pl. 271, note; *The People v. Curling*, 1 Johns. 320. In the present case, more was set out in the indictment than was required agreeably to Price's case. We do not feel called on to determine what it would be necessary for an indictment to charge in prosecutions before the United States courts, under the general banking law of the United States. The question with us is what would be sufficient in an indictment for embezzlement under the laws of this State. The indictment in *Wise v. The State*, 41 Texas, 139, which was held good by the Supreme Court, was not more specific in some of the particulars here complained of than the indictment before us; but, without pressing this inquiry further, we are of opinion that the indictment sets out the offence with which the appellant is charged in plain and intelligible language, and is sufficient to support the verdict and judgment; and that there was no error in overruling the motion to quash it.

With reference to the alleged error in admitting testimony over objection, the first bill of exceptions shows that the prosecution was permitted to prove, over objection, by a certificate of the United States comptroller of the currency, that the "First National Bank of Fort Worth" was authorized to do a banking business under sect. 5169 of the Revised Statutes of the United States. We are of

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opinion the testimony was admissible; still, if it was unnecessary to set out the act of incorporation, as was said in *Price v. The State*, it was only necessary to prove the name of the corporation. Yet, however this may be, the prosecution proved on the trial, by written testimony, the organization, name, and locality of the bank, and without apparent objection; and the objection to the admission of the comptroller's certificate became immaterial.

The matter mentioned in the second bill of exceptions is about this: The prosecution offered in evidence certain cotton-receipts which recited that the cotton mentioned in the receipts was "held subject to order of First National Bank on return of this receipt," which were objected to because the receipts varied from the allegations in the indictment, and because they showed that the cotton was received from another and not from the bank. This objection applied to all the cotton-receipts offered in evidence. As to this bill of exceptions, the court appends the following: "I, A. J. Hood, do hereby append, as a part and parcel of this bill of exceptions, this statement, viz.: On the trial, previous to offering to read said cotton-receipts, the State had handed said receipts to witnesses on the stand, — among others, W. Jeffries, — who by their evidence explained said receipts, showing, among other things, that the words 'First National Bank' meant, and was intended to mean, 'First National Bank of Fort Worth.'" We are of opinion that this explanation removed the objection on the ground of a variance between the allegation and the proofs, and was admissible testimony to explain an apparent ambiguity in the face of the receipts. "As it is a leading rule, in regard to written instruments, that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the *nature and qualities of the subject* to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its

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character from verbal communications respecting it. Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract," etc. 1 Greenl. on Ev., sect. 286. But authorities are not wanting to show that the testimony given relative to the meaning of the receipts went to explain and not to contradict the writing, and was legitimate testimony and destroyed the seeming variance.

The matter set out in the third bill of exceptions is unimportant at this stage of the proceeding, as it could not have influenced the verdict. The fourth bill of exceptions sets out that a witness for the State was asked, on the part of the prosecution, if he knew of any sale of cotton made by the defendant to one Potter about the time the defendant left; which was objected to on the ground that the witness should be confined to the twenty bales mentioned in the indictment, and because the witness had previously stated that he did not know that the identical twenty bales charged in the indictment were included in any sale made to Potter. The bill of exceptions does not set out what the testimony was, so as to enable us to determine its importance.

The next bill of exceptions states a matter of some importance. The cashier of the bank was asked by the State what contract, if any, the said bank had with defendant in regard to the indorsements on cotton-receipts shown the witness; when the defendant's counsel objected, unless the witness could testify from his own knowledge concerning the facts of said indorsements. Thereupon, it appearing to the satisfaction of the court, from previous statements of the witness, that he, witness, as an officer of the bank, had in person prepared and submitted to defendant before the making of the receipt the full form of said indorsement, and had come to an understanding in person with the de-

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fendant, the court overruled the objection, and the witness testified that between the said bank and defendant, in advance, it was fully agreed that said indorsements should be by defendant placed on all the cotton-receipts to be taken up by said bank, when the cotton was stored in defendant's cotton-yard; to which the defendant excepted.

The testimony abundantly shows the matter of the indorsement on the cotton-receipts, to the effect that the cotton covered by them was to be held by the defendant subject to the order of the bank, on return of the receipts, and that this was well understood by and between the bank officials and the defendant at the time and before the cotton charged to have been embezzled went into the defendant's possession. What the contract was, was a proper subject of inquiry, and this witness showed he was competent to testify concerning it; and in this we see no error.

Other bills of exceptions were taken to the admission of testimony going to show that other persons had taken cotton away from defendant's cotton-yard. It seems that this testimony was admitted rather in the prosecution of an inquiry as to where the cotton of the bank had gone to than for any other purpose, and perhaps to show that defendant had disposed of it. The proof, it seems, does not show that any of those parties obtained any of the cotton for which the bank held the defendant's receipts, and to one of the bills of exceptions the judge appends this statement: "The court at the time expressly instructed the jury that this evidence, and all evidence of the kind, was only to be by the jury considered in connection with statements of other witnesses relative to the number of bales actually on the cotton-yard of defendant at the time spoken of as the 'break-up' by the witnesses."

It is in proof that at a certain named time the defendant unceremoniously left Fort Worth, leaving in his cotton-yard a quantity of cotton belonging to different persons, and there was a rush and much excitement over the affair, and

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it is to this feature the witnesses are understood to refer in speaking of the "break-up;" but it seems not to have been shown that in the scramble over the cotton left on the yard any witness testified who received the missing cotton claimed by the bank, and, except a few bales found in the yard, the balance was not accounted for by the testimony.

The judge appends to another bill of exceptions the following: "The State, on the trial of this cause, was not allowed in a single instance to prove against the defendant other acts of embezzlement, the court ruling such proof not allowable. But the evidence drawn out by defendant's counsel went to show that after defendant left Fort Worth there was at one time on defendant's cotton-yard one hundred and fifty or one hundred and eighty bales of cotton, and the State offered evidence to show who claimed and got that cotton, and was allowed by the court, over objections of defendant, to introduce evidence as to whose cotton that one hundred and fifty or one hundred and eighty bales was. But on the trial for embezzlement charged, no other acts of embezzlement were allowed by the court to be proven against defendant." In these bills of exceptions, with the explanation given by the judge, the seeming objection vanishes, and it does not appear that any material error was committed in the admission of testimony under all the circumstances surrounding the trial.

On the subject of the special charges refused by the court, we are of opinion that the general charge presented to the jury the law on the subject to the extent the testimony warranted, and that the court did not commit any material error in refusing the charge asked by the defendant's counsel. It would be unprofitable consumption of time to undertake to follow and discuss in their order all the objections urged in the motion for a new trial and in the assignment of errors, as well as in the able brief and arguments of appellant's counsel against the charge of the court as to the law of the case, as made by the record before us.

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One portion of the charge, however, seems to require more than a passing notice ; this seems to be set out in a separate paragraph, as follows : “And again, on the trial of any criminal action, when the facts have been proved which constitute the offence, it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or omission.” This charge may not be objectionable, in view of the seeming attempt to prove that the cotton of the bank was on the yard of the defendant at the time he is shown to have left Fort Worth. But whilst this may be law in every case, we cannot conclude that it is an appropriate instruction to give to the jury in any and every case ; and whilst the charge was harmless in the present case, inasmuch as we do not see how the jury could have been misled by it, in view of the testimony and the preceding and succeeding portions of the charge, we deem it unnecessary. The legal principle enunciated would be inapplicable as a charge in an ordinary case where a defendant has pleaded not guilty. In such a case the general rule is that the burden of proof does not shift from the State to the defendant, and generally it would be error to so charge. This charge was not excepted to.

It is further objected to the charge that it assumes as law that embezzlement can be committed by one who has but a qualified and not an absolute right to the ownership of the property charged to have been embezzled. The offence is so near akin to larceny that it must be held that the same kind of ownership which would support an indictment for the one would support an indictment for the other. A qualified ownership with the right of control and possession would, it seems, support either. It is urged on the part of the appellant that the bank cannot, under the law, own personal property, or take a mortgage or other lien upon such property, and therefore cannot hold the cotton in question as a pledge or surety for the payment of money advanced on the faith of it. We are not aware of any authority

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which goes to the extent of permitting one charged with embezzlement of property so situated, or theft of property, or any other kind of fraudulent and criminal appropriation or disposition of it, to raise the question of *ultra vires*. To our minds, the Penal Code of Texas makes no material difference in the protection afforded to the property and property rights of corporations and those of individuals, and by it all who violate its provisions, when prosecuted criminally before the judicial tribunals of the State, must be treated and judged alike. Whilst we have not attempted in this opinion to discuss all the interesting questions presented in argument, yet they have had all the consideration their importance and the earnestness and zeal with which they have been presented required at our hands; and we are constrained to say that we have not found such material error as would authorize the reversal of the judgment of the District Court.

The material questions of fact on which the guilt of the accused depended seem to have been submitted to the jury under full and appropriate instructions, and we cannot say that the verdict is wanting in a sufficiency of evidence to support it. The judgment is affirmed.

Affirmed.

[After the delivery of the foregoing opinion affirming the judgment, and within a few days of the conclusion of the term, a motion for a rehearing was filed by the counsel for the appellant, and was supported by a forcible argument upon the controlling features of the case. Before the adjournment for the term, the motion was considered and overruled, with the announcement that the pressure of business had precluded the preparation of a written opinion, but, if practicable, one would be delivered at the ensuing Galveston term. Accordingly, at an early day of the Galveston term, 1880, the following opinion on the motion for a rehearing was rendered. — REPORTERS.]

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CLARK, J. The several points relied on by the appellant, in his motion for rehearing, may be briefly stated as follows :

1. A portion of the evidence having tended to show that appellant had authority to sell the cotton alleged to have been embezzled, if he did in fact sell the cotton he could not be held guilty of embezzlement of the particular property as charged, and his instruction requested to that effect should have been given ; and the court erred in refusing it, and in instructing the jury that they should acquit in case he sold the cotton without any fraudulent intent.

2. The court erred in admitting, over the objections of the defendant, testimony tending to show other acts of embezzlement ; and further, in failing to limit the effect of such testimony after it was admitted.

3. The evidence shows that the defendant was a mere mandatary and not a bailee for hire, as alleged.

4. The evidence fails to show that the property was embezzled, and the charge of the court devolved upon the defendant the necessity of showing that it was not embezzled.

5. The evidence shows a fraudulent disposition of mortgaged property, and not embezzlement.

Many, if not most of the refinements incident to the law of embezzlement under both the English and American statutes have been modified by later legislation, and the tendency of the decisions at this day is to assimilate that offence to larceny, in accordance with the plain purpose of the law-making power in its first conception. The necessity which first gave rise to its enactment was a defect in the law of larceny, which failed to provide any criminal remedy for breaches of various trusts incident to the multiplied affairs of business, and to provide a punishment for fraudulent breaches of trust on the part of agents, servants, clerks, trustees, bailees, and other persons occupying a fiduciary relation, which at common law did not exist. All authorities coincide that the offence is akin to larceny, and

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belongs to that family, and our statutes have always fixed its punishment the same as larceny. In a recent prosecution in England, under the statute 24 & 25 Vict., c. 96, sect. 68, it was contended for the prisoner, upon the authority of *Rex v. Hassall*, 1 Leigh & C. 58, that he could not be convicted, because it was clear the property was never to be returned to the owner, who had intrusted it to the prisoner, and who was therefore not a bailee. But Pollock, C. B., held otherwise in the following terse opinion, which we copy entire: "We are all of opinion that this conviction must be affirmed. It seems to me that the question is only like what I said it was on Saturday last, viz., whether stealing is stealing." And Martin, B., remarked, in addition, "Common sense is beginning to prevail." See 14 Week. Rep. 679. And in a subsequent case in Ohio, involving many of the distinctions set up in this case, the court said: "There is no more reason why courts should allow themselves to be misled by mere names and shadows in the administration of justice in criminal than in civil cases." *Calkins v. The State*, 18 Ohio St. 371. And such is the settled rule enjoined by the Code. Pasc. Dig., art. 1611.

1. Addressing ourselves to the points presented, we are of opinion that notwithstanding the appellant may have had authority to make a sale of the cotton alleged to have been embezzled, yet if he sold the same with the formed intention to defraud the owner, and to convert it to his own use and benefit, he is as much guilty of embezzlement of the cotton as if he had no authority to make such sale. What is embezzlement? A fraudulent appropriation of the property of another, by a person to whom it has been intrusted. There is no settled mode by which this appropriation must take place, and it may occur in any one of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply matter of evidence, and not pleading; and the appellant in this case was charged in the usual form, that he "did embezzle,

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fraudulently misapply, and convert to his own use" the particular property described. If he sold it with the honest purpose of delivering the proceeds to the owner, and after such sale conceived the fraudulent intention, he would not be guilty of embezzlement of the cotton at least. But if the sale was simply a means to effectuate his fraudulent purpose to convert the property to his own use, — in other words, to steal it, — it is as much an act of conversion as if he had shipped it clandestinely to a foreign port, and there disposed of it. This distinction is not unsupported by authority, and we are referred to none of a contrary effect.

In *United States v. Sander*, 6 McLean, 598, the defendant was indicted in two counts, for opening a letter of another and with embezzlement of the letter, and set up in defence an agency. The court instructed the jury to determine the fact of agency, and if they found that the defendant received the letter without any criminal purpose at the time, they should acquit; but if the letter was obtained from the post-office with criminal intent, it was larceny, although the defendant may have had the previous authority of the person to take her letters from the office. See also Archb. Cr. Pr. & Pl. (6th ed.) 460–463, note.

It is urged with much ability and earnestness that this view obliterates the fundamental doctrine in criminal jurisprudence, that, before there is crime, an unlawful act must unite with the unlawful intent; and we are referred to Mr. Bishop in support of the position. That such is the general doctrine no one can question; but it has its exceptions, like almost every other general rule. The same author says: "When a particular thing, of a nature to be embezzled, has come into the hands of the servant, he is in reason to be held guilty of embezzling the thing, in all circumstances which show a malicious intent to deprive the master of it. Suppose, for instance, he has the right to mix it with his own property, and does mix it, intending at the same time to embezzle what he thus mixes, why let him escape on the

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ground that his act itself was alone no violation of duty, but only his act when coupled with his intent? Many criminal acts are criminal only because of the intent with which they are done." 2 Bishop's Cr. Proc., sect. 369. The charge of the court presented with accuracy the exact distinction applicable to the facts in proof, and the instruction requested and refused was not the law of the case.

2. The evidence relating to other acts of embezzlement, which was objected to by appellant, was introduced to meet an issue raised by the defence, to wit, that the cotton alleged to have been embezzled was in fact left upon appellant's cotton-yard at the time he absconded, and that the necessary and reasonable presumption was that other parties holding storage-receipts for cotton in that yard had gone upon the yard and taken their own cotton, and this particular cotton as well. To anticipate or rebut this presumption, the State introduced certain parties who held these receipts, one of whom testified that he held receipts for fifty-one bales and got only sixteen bales, which were all that was left upon the yard; and the other testified that he held receipts for eleven bales and got none. This evidence was restricted by the court below to the point above indicated, but it was admissible without such restriction. *Rex v. Richardson*, 2 Fost. & Fin. 343; Roscoe's Cr. Ev. 86, 88, 94; 2 Russ. on Cr. 777; 1 Greenl. on Ev., sect. 53. If it were necessary to a determination of the question, which is not the case, it might be assumed, from one of the theories of the defence, that these other fraudulent acts were contemporaneous with and parts and parcels of the identical transaction for which the defendant was on trial. The rule applicable to this case is found in *The Commonwealth v. Tuckerman*, 10 Gray, 199, and not in *The Commonwealth v. Shepard*, 1 Allen, 575.

3. For a proper disposition of the third ground of the motion, it suffices to say that the appellant was estopped by his receipts from claiming that he was not a bailee for hire.

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Ex parte Hedley, 31 Cal. 113; 2 Bishop's Cr. Law, sect. 367. Apart from this, there was evidence tending to show a special contract between the appellant and the bank that the former should receive a certain sum for storage of each bale, which constituted a charge upon the cotton, payable when the cotton was delivered. The jury were authorized to believe this, and the State was not confined to showing that the storage-fee was the exact sum alleged, the real issue being whether the appellant was a bailee for hire or not. *Henry Smith v. The State*, ante, p. 382. This the record conclusively shows.

4. The offence of embezzlement is invested with no such favor or peculiarities under the law as to necessitate its proof by express and positive testimony. In prosecutions for this offence, it is only necessary that the evidence should satisfy the minds of the jury, beyond a reasonable doubt, that the defendant is guilty of the act charged. This may be shown in any of the modes designated in the general law of evidence. The facts essential to be established in this case were: 1. That the First National Bank of Fort Worth was the owner of the cotton; 2. That it deposited the cotton with defendant as a bailee for hire, and that the defendant received it as such, charged with the duty of holding it for the owner, and subject to its order; 3. That, pending the existence of this relation, he fraudulently appropriated it to his own use. We are of opinion the evidence establishes these propositions beyond a reasonable doubt. There can be no reasonable question as to the two first named, and the circumstances in evidence established with unerring certainty the last. It was not necessary for the State to prove a demand for the cotton, because the defendant absconded, and, from the evidence, left no authorized agent upon whom any demand could have been made. If this were not so, a demand was not necessary in any event. *The Commonwealth v. Tuckerman*, 10 Gray, 173. The fraudulent appropriation is to be inferred from facts; and flight, in-

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solvency, concealment, or evasion, form strong circumstantial proofs of guilt. Whart. Cr. Law (7th ed.), sect. 1927; *The State v. Leonard*, 6 Coldw. 307; *Rex v. Williams*, 7 Car. & P. 388 (32 Eng. Com. Law, 644).

Nor do we deem the charge of the court subject to the criticism made by counsel. The two statutes, one in the Code of Criminal Procedure, and the other in the Penal Code, when taken and construed together, are not in conflict with each other nor with any decision in our reports. A defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence; and in case of reasonable doubt as to his guilt, he is entitled to be acquitted (Pasc. Dig., art. 3105); but on the trial of any criminal action, when the facts have been proved which constitute the offence, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission. Pasc. Dig., art. 1655. In other words, the law starts the trial with the presumption of innocence in favor of the prisoner, which continues until a verdict of guilty; but the State is not called upon to do more than to prove its own case. It is only required to prove the facts which constitute the offence, and rest its case. If there be no further evidence, the case goes to the jury with the evidence for the State, which must be tested by them, on their retirement, by legal rules as to its sufficiency, including the rule as to reasonable doubt. If evidence be introduced by the defendant tending to establish facts or circumstances upon which he may rely to excuse or justify the prohibited act or omission, then the question of his guilt is to be decided on the whole evidence, without pausing to inquire whether it was introduced by him or by the State. The proposition embodied in art. 1655 was frequently enunciated as law by our highest court before the adoption of the Codes. *Henderson v. The State*, 12 Texas, 525; *Belverman v. The State*, 16 Texas, 130; and in *Hall v. The State*, decided at Galveston in 1875, but never re-

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ported. These cases, together with the statute, were reviewed in connection with the decisions of other States, and recognized as substantially the law. This case of Hall is the leading case upon which many later decisions have been based, and it is unfortunate for the profession, and the proper administration of criminal law, that its publication has been so long delayed. The charge objected to in that case is totally dissimilar to the one at bar. The defendant was indicted for assault with intent to murder, and the court instructed the jury that "the burden of proof is on the defendant to show the facts and circumstances which would excuse or justify the shooting; that, the shooting being established, the burden of proof is upon the defendant to show the sudden passion or adequate cause which would reduce the offence below the grade of an assault with intent to murder." This portion of the charge was objected to because it relieved the State from the necessity of proving that the shooting was unlawful, and done with malice aforethought express or implied, and threw upon the defendant the burden of proving his innocence, instead of the burden of meeting a *prima facie* case of guilt as charged. The court held that the charge, as a whole, did not infract the law, though perhaps the jury may have been misled by the context. But they expressly declined to rest the decision upon this ground, and the judgment was reversed for another error. And in the following quotation they recognize the principle announced in the charge and complained of in this case: "The principle in all these cases [numerous cases in this and other States] is, that although the defendant must establish the facts on which he relies to excuse or justify his acts, when such excuse or justification does not arise out of the evidence against him, yet the burden of proof is not on him in the sense it is understood to rest on a defendant in a civil suit." Subsequent decisions have in no manner qualified this case. *Perry v. The*

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State, 44 Texas, 473; *Brown v. The State*, 4 Texas Ct. App. 275; *Ake v. The State*, 6 Texas Ct. App. 398.

Without undertaking to enumerate cases wherein such an instruction might be objectionable, we are of opinion that this case not only justified but would seem to have required it, as the whereabouts and disposition of the cotton were wholly within the knowledge of appellant; and after the establishment of the *prima facie* case of guilt as above indicated, it peculiarly devolved upon him to establish his excuse or justification.

5. The distinction attempted to be drawn in the fifth ground of the motion, to wit, that the defendant, if guilty at all, was not guilty of embezzlement, has been often attempted and has as often failed. *Calkins v. The State*, 18 Ohio St. 366; *Hutchinson v. The Commonwealth*, 82 Pa. St. 472. The latter of these cases also decides that the title to the cotton passed by delivery of the receipts. But authorities are hardly necessary upon that point.

After a patient hearing and consideration of the points presented, we find no reason for disturbing the judgment, and the motion for rehearing is overruled.

Rehearing refused.

R. SHRIVERS *v.* THE STATE.

1. EVIDENCE. — In a trial for murder, the State having been allowed, without objection, to prove what the defendant, after his arrest, and uncautioned, said respecting his possession of the deceased's pistol, the defendant should have been permitted to prove any fact or circumstance, or any declaration made by himself at the time or immediately afterwards, tending to explain, impair, or destroy the evidence thus adduced by the State. To render his own declarations competent, however, it must appear that they come within the exceptions to the rule that a party cannot make evidence for himself.
2. CONFESSIONS. — Statements of an uncautioned prisoner cannot be made evidence against him by proving that they were repeated in his presence, while he was still in custody, and that he made no reply.

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3. CHARGE ON MURDER in the second degree is erroneous if it permits the jury to convict of murder in the second degree without finding that the killing was on implied malice.
4. MANSLAUGHTER. — Note evidence in a trial for murder making a charge on manslaughter requisite.

APPEAL from the District Court of Cherokee. Tried below before the Hon. P. F. EDWARDS.

There was no controversy that Alexander Mills, the deceased, came to his death in Cherokee County, July 3, 1879, by means of three stabs with a pocket-knife, inflicted by Robert Shrivvers, the appellant, who was a "cropper on shares" on land of the deceased.

The encounter and homicide occurred late in the evening, and at the premises of Green Mills, a brother of the deceased, and about a mile from the home of the latter. The difficulty originated in the use by the defendant of a buggy and mule belonging to the deceased. On the day of the homicide, the defendant drove the mule and buggy a distance of ten miles, and on his return stopped at the house of Green Mills, and hitched the mule and buggy to the fence some twenty feet in front of the gallery.

Green Mills, testifying for the State, testified that he, being in his field, saw the defendant as the latter passed with the mule and buggy towards witness's house. Soon afterwards the deceased came along on foot, and asked if witness had seen any thing of his mule and buggy; and on learning from witness that the defendant had just passed with it, he went on towards witness's house. This was after sunset, and defendant stopped his ploughing and started home. When he reached his lot gate, about thirty steps from where the killing took place, he heard loud talking, and saw the defendant walking down towards where the deceased was, about the rear of the buggy, and then get over the plank fence. Witness next observed that the deceased had his left hand in the defendant's collar, and his right

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hand down by his side. Defendant had his left hand and arm around the deceased's neck, and his head lying on the deceased's shoulder, and was striking the deceased with his right fist, saying repeatedly, "Don't show your pistol!" Defendant threw his left foot in front of the deceased and tripped him up, the latter falling on his knees, with his left hand on the ground and his right employed in warding off the defendant's blows. Defendant got astride and on the back of the deceased, and, reaching around the latter's shoulder, stabbed him three times in the breast with a knife. Witness twice pulled the defendant off the deceased, but he jerked away, and continued to strike the deceased. Witness and W. Arnwine finally pulled the defendant off the deceased, and the latter rose, walked away, and staggered to the gate, where his wife was, and she and witness helped him to the house and laid him down on the gallery, where he died in about five minutes. While he was staggering towards the gate, the defendant attempted to follow him, but was prevented by Arnwine, who got between him and the gate.

Mrs. R. Pearce, for the State, testified that when the deceased came up to the fence where the mule and buggy were hitched, she, W. Arnwine, Mrs. Green Mills, and the defendant were sitting on the gallery. The deceased commenced to untie the mule, and seemed angry and excited. Defendant rose up from his seat and called to the deceased to know what he was going to do with that mule and buggy, asking him at the same time, "Didn't you let me have that mule and buggy to go to Jacksonville to-day?" To which the deceased replied, "No, I did not; I let you have the mule to plough the cotton." The defendant then said, "I want that mule and buggy to go to Troupe to-night to a party;" and the deceased replied, "I want the mule and buggy to take my wife and child home." Defendant then went out to the fence, and, after some further exchange of words, got over the fence to the outside, near where the

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deceased was standing. After some further angry words between them, the deceased advanced and caught the defendant in the collar with his left hand, throwing his right hand to his side and under his coat. Defendant said, "Alex, I'm not afraid of you; don't draw your pistol." Defendant was giving back and the deceased advancing, when the defendant put his arm around the deceased's neck, with his head over the latter's shoulder; and about that time the witness called out from the gallery, "Don't shoot." The further testimony of this witness concurred substantially with that already stated, and other witnesses for the State and for the defence narrated the encounter and its incidents to the same effect. No pistol or other weapon was shown by the deceased, or found upon him after the difficulty. Two witnesses for the defence said he bore the character of a violent and dangerous man.

B. F. Chandler, sheriff of the county, testified, for the State, that on Saturday succeeding the Thursday of the homicide he saw the defendant in Troupe, a short time after Mr. Holcomb, one of witness's deputies, had arrested him. In the defendant's presence, witness received a pistol from Holcomb, which the latter then said had been found on the defendant's person when he was arrested, from thirty to sixty minutes previous; and which pistol, being the deceased's, was to be returned to Mrs. Mills, the widow of the deceased. The defendant said nothing in denial of what Holcomb told witness. It was in proof that the defendant, a few minutes after the killing, went in the direction of the deceased's, and was not seen again by any witness until after his arrest.

With reference to the pistol, Mrs. Mills, the widow of the deceased, in her testimony for the State, said that it was lying on the mantel-piece at her home when she last saw it previous to its return to her by the sheriff. She had come to Green Mills's the day before the homicide, and the pistol was on the mantel-piece when she left home.

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In rebuttal of Chandler's testimony, the defence proposed to prove by Rial Smith that the defendant, within an hour after his arrest, and after Holcomb's statement to Chandler, told when and where he got the pistol, and that he got it after the killing. This was excluded on objection by the prosecution that the defendant's declaration was not evidence in his behalf; and the defence reserved exceptions.

The appellant was found guilty of murder in the second degree, and his punishment was assessed at thirty-seven years in the penitentiary.

R. H. Guinn and S. B. Barron, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. The evidence of the witness Chandler, as to what his deputy Holcomb, in presence of defendant, said the prisoner told him when the pistol was delivered up, was in the nature of hearsay evidence, and was not admissible if it had been objected to by the defendant. Because when the statements were made by Holcomb, the defendant, though present, was under arrest, and his condition as a prisoner protected him from such declarations or admissions, even if they had been made by himself; and when made by Holcomb in his presence, he was not bound to deny them in order to avail himself of this legal protection, and avoid the force of the statements as *quasi*-confessions. His presence did not affect the *status* of the evidence. It must be treated as though he was not present at the time, and therefore as hearsay.

Having been admitted, however, at the instance of the State as a criminative circumstance, without objection from defendant, the defendant was entitled to show any fact, circumstance, or declaration made by him at the time, or immediately afterwards, tending to explain, impair, or destroy the force of this evidence for the State. *Davis v.*

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The State, 3 Texas Ct. App. 91.; *Chaney v. The State*, 31 Ala. 342.

To render such after-declarations or statements admissible as explanations, it must appear that they were made recently after the former; and it must also be obvious from the circumstances that they are not obnoxious to, but come within the exceptions to, the general rule that a party cannot make evidence for himself, either by his acts or his declarations. We think the matter in this instance did come within the exception, because the explanation was made within a short time, to wit, within an hour, and was both reasonable, probable, and entirely consistent with the former statement. The court, therefore, after admitting this evidence, erred in ruling that the testimony of Rial Smith was inadmissible, as shown by the bill of exceptions.

But, as above stated, the evidence of Chandler was hearsay, and was further inadmissible if sought to be used as tantamount to a confession of defendant. If Holcomb himself had been upon the stand, he should only have been permitted to testify that he took the pistol from defendant, and not what defendant might have said; because the defendant at the time was under arrest, and it does not appear that he had been warned that any thing he said would be used as evidence against him. In other words, his declaration did not come within the rules of confession. Code Cr. Proc., art. 750.

The charge of the court to the jury is complained of, and we select the following paragraph as declaring a proposition which is incorrect in law: "Or if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant, Robert Shrivvers, did in Cherokee County, at any time before the filing of the indictment, to wit, the 24th day of October, 1879, unlawfully kill Alexander Mills, without excuse or justification, by intentionally cutting and stabbing him, and you have a reasonable doubt whether said killing was done with express malice, you will find him guilty of

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murder in the second degree.” To have made such a killing murder in the second degree, it would have been necessary for the jury to have believed that the killing was also done with implied malice. As the proposition is stated by the court, the offence would not have been murder in the second degree, but is more nearly akin to manslaughter; which, under our law, is “voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law.” Rev. Penal Code, art. 593. Without the essential ingredient of implied malice, it was error to instruct the jury to find defendant guilty of murder in the second degree.

Another error, as we believe, committed by the court, was in failing to give the defendant the benefit of a charge upon the law of manslaughter. It is true that “insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, * * * are not adequate causes” sufficient to reduce a homicide from murder to manslaughter. Rev. Penal Code, art. 596. But it is to be remembered, in this case, that though it afterwards was ascertained that deceased really had no weapon upon him at the time he assaulted defendant and took him by the collar, yet, from his movements, parties looking on thought he was trying to draw a weapon; and defendant evidently thought so too, for the brother of deceased, and other witnesses, heard him tell deceased “not to show” or “draw” his pistol.

Under such circumstances, the law of manslaughter should have been submitted to the jury.

It is unnecessary to notice or discuss the other errors complained of, as they are not likely to arise on another trial. For the errors above pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

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A. W. JONES v. THE STATE.

1. **PROOF OF HANDWRITING** by comparison is expressly authorized by the Code of Criminal Procedure; but this does not change the intrinsic value of such evidence, which has always been considered feeble, and in some of the States held to be unsafe.
2. **MURDER — EVIDENCE.** — To support a conviction for a capital offence, more is demanded by the law than a strong suspicion or strong probabilities of the guilt of the accused. The evidence must, to a moral certainty, lead to the conclusion of his guilt beyond every other reasonable hypothesis.
3. **ACCOMPLICE TESTIMONY — CORROBORATION.** — In the trial of a defendant indicted as an accomplice to a murder alleged to have been committed by three principals, the only witness for the State who implicated the defendant was a self-confessed accomplice. Many of his statements were strongly corroborated, but they related to the acts and conduct, not of the defendant, but of the witness himself and the persons indicted as principals. Of his statements inculpatory of the defendant, many were directly contradicted, and but one in any degree corroborated, — the corroboration consisting of expert evidence of the handwriting of a paper which was affixed to the coat of the deceased, and which, according to the testimony of the accomplice, was furnished for that purpose by the defendant prior to the commission of the offence. *Held*, that the evidence is not sufficient to support a capital conviction.

APPEAL from the District Court of McLennan. Tried below before the Hon. L. C. ALEXANDER.

This is the second trial and conviction of the appellant for murder in the first degree, upon an indictment charging him as an accomplice to the murder of James McCann. The first conviction was set aside by this court on account of the insufficiency of the evidence, and the facts of the case will be found in 4 Texas Ct. App. 436. The evidence at the second trial, from which the present appeal arises, was in every material respect identical with that at the first, and will be found in the report above referred to.

Clark & Dyer, Herring, Anderson & Kelley, and Evans & Davis, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

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WHITE, P. J. There is but little, if indeed any, material difference between the evidence as shown in the record now before us and that disclosed on the former appeal (*Jones v. The State*, 4 Texas Ct. App. 436), when the case was reversed solely because in our opinion the evidence was insufficient to support the verdict and judgment. In this case, as in that, the question is, Has the testimony of the accomplice who turned State's evidence been corroborated in material matters tending to connect appellant with the commission of the homicide? It is a rule well settled, that in a case where corroborating evidence is required, it is always permissible to strengthen a witness's testimony by connected incidents showing its consistency and reasonableness. *Burton v. The State*, 21 Texas, 337.

This has been attempted in this case by showing that many incidents and facts related by the accomplice have been fully established by indubitable testimony. And we are free to confess that in ordinary cases the corroboration of such and so many incidental facts would go a great way to strengthen the testimony. But this is no ordinary case. Appellant is not charged, either by indictment or by the accomplice, as having been present at and an active participant in the homicide; he is only held to be an accomplice himself, — one who was not present, but whose guilty complicity consisted in his aiding, encouraging, and inciting the actual perpetrators to the commission of the deed, before its accomplishment. These incidental facts and circumstances which are supported relate mainly to the actions of the active participants in the crime, and to the conduct and actions of the State's witness himself. All these collateral facts which are substantiated so fully may and can be true, and yet be reasonably and fully accounted for upon the hypothesis of the guilt of others and the perfect innocence of defendant.

There are six separate and distinct interviews specified and named by the witness, in which this accused and some one or more of the other parties charged with the homicide

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are said to have planned, discussed, and arranged the details of this murder; and in all but one he is directly and positively contradicted by the witnesses for the defence, some of whom had been tried for and acquitted of this murder, and others of whom had had the case dismissed by the prosecution after they were indicted. It will not do to say that the State's witness was entitled to more credit than they; on the contrary, they were freed by the law from all imputation of crime, whilst the witness was by his own admission an accomplice in the deed. The interview not positively denied was one which the witness said took place between himself, defendant Jones, and one William Blocker, about six weeks before the killing. This testimony was denied by Blocker on the record in the former appeal; and the same record shows that though Blocker had also been indicted, the prosecution was dismissed as to him. There is not one single witness who corroborates the statement as to either of these interviews and conversations.

We come, then, to the only point in which there is the slightest tendency to corroboration in a material matter connecting defendant with the homicide. Expert testimony was introduced to show, and the experts did testify, from a comparison of writings admitted to be genuine with the writing found pinned to the lapel of the murdered man's coat, that in their opinion defendant wrote the latter.

Heretofore, in the cases of *Nourse v. The State*, 2 Texas Ct. App. 304, and *Jones v. The State*, 3 Texas Ct. App. 575, the rule established in California is adopted, to the following effect: "The corroborating evidence may be slight, and entitled to little consideration; nevertheless the requirements of the statute are fulfilled if there be any corroborating evidence which of itself tends to connect the accused with the commission of the offence." *The People v. Melvane*, 31 Cal. 614. When either of these cases (*Nourse's*, *Jones's*, and *Melvane's*) is examined, it will be seen that in fact the corroborating evidence was positive

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and satisfactory, not only as to material matters, but matters which could not be explained consistently with the innocence of the accused.

Our statute provides that "it is competent in every case to give evidence of handwriting, by comparison made by experts or by the jury." Rev. Code Cr. Proc., art. 754. The fact, however, that our statute permits such evidence does not change the well-established rules as to the value of such testimony. Such evidence has always been considered feeble, and in some States unsafe to act upon. *Burman v. Plunkett*, 2 McCord, 518, cited in *Hanley v. Gundy*, 28 Texas, 211. In *Adams v. Field*, 21 Vt. 265, it was said: "But those having much experience in the trials of questions depending upon the genuineness of handwriting will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable, or where courts and juries are more liable to be imposed upon." 1 Greenl. on Ev., sect. 580, note 2.

It makes no difference, however, in our view of the testimony before us, whether this character of evidence be weak or not. We are of opinion that if it were admitted that the writing was defendant's, still the evidence would not necessarily be conclusive of guilt, or tend so strongly to establish his guilt, even in connection with the testimony of the accomplice, as to warrant us to allow the conviction to stand as a precedent upon which a human being's life should be taken at the demands of the law. The writing may create a suspicion, a strong suspicion it may be,—it may create a probability, a strong probability if you will, that his guilty complicity in the crime is established as charged. But the law, in its wise and humane demands for the life of a human being, demands more than strong suspicion, more than strong probabilities,—it demands that the evidence should lead, to a moral certainty, to the conclusion of guilt beyond every other reasonable hypothesis. Less than this will not suffice.

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The evidence in this case does not fill the full measure of the standard which the law requires, and the judgment is therefore reversed and the cause remanded for a new trial.¹

Reversed and remanded.

GEORGE YOUNG v. THE STATE.

NEWLY DISCOVERED EVIDENCE. — Being convicted of an assault with intent to murder, the defendant moved for a new trial, and filed a supporting affidavit made by the assaulted party, to the effect that the defendant cut her by accident and that she had not intended to prosecute him. *Held*, that the motion was properly overruled, as the testimony of other witnesses fully warranted the conviction, and the intention of the assaulted party was immaterial.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. NOONAN.

The opinion sufficiently indicates the case.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Mary Robinson, the assaulted party, testified on the trial to two assaults made upon her by appellant: one by striking her with his fists whilst they were lying upon the bed; and the other after they had got off the bed, when he struck at and cut her upon the throat with a razor. In support of the motion for a new trial, which was on the ground of newly discovered evidence, the same witness, Mary Robinson, makes an affidavit, in which she states substantially that she does not believe that defendant

¹ CLARK, J., having been of counsel in the court below, did not sit in this case.

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intended to cut her; that the cutting was purely accidental, and with no intention of injuring her; and that defendant was arrested without her knowledge or consent, and it was not her intention to prosecute him.

Unfortunately for defendant, the facts establishing guilt and guilty intentions do not rest alone upon the testimony of this witness, but are also testified to by others; and whether she desired him prosecuted or not, in no manner affects the question of his guilt, or the right of the State to punish him for a grave crime committed against the law.

There is no error in the record before us, and the judgment is affirmed.

Affirmed.

CAROLINE BULLION v. THE STATE.

1. OBSTRUCTING RAILROAD TRACK. — To warrant a conviction, under art. 678, Rev. Penal Code, for placing an obstruction on a railroad track, the evidence must show that the obstruction was such as might have endangered human life, — which is the gist of the offence. This is not proved by evidence that the defendant placed across a railroad track a piece of iron bar which the witness was unable to remove with his foot, but did remove with his hands.
2. SAME — EVIDENCE. — The State proved the obstruction to have been a piece of railroad-iron, six or eight feet in length, put across a track, and that it was removed before any train passed. To show that human life might have been endangered thereby, the State could and should have proved whether it was on a level or an embankment, the main track or a switch, and the usual speed of trains thereat.

APPEAL from the District Court of Dallas. Tried below before the Hon. G. L. ALDREDGE.

The offence charged being a felony punishable by the penitentiary not less than two nor more than seven years, the jury assessed the appellant's term at three years.

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No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. The prosecution in this case was had under provisions of art. 2342, Pasc. Dig. (Rev. Penal Code, art. 678), as follows: "If any person shall wilfully place any obstruction upon the track of any railroad, or remove any rail therefrom, or in any other way injure such road, or shall do any damage to any railroad or car, whereby the life of any person might be endangered, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years."

As presented in the record, we are not satisfied with the sufficiency of the evidence to sustain the conviction. Even if the statements made by the principal witness for the prosecution, as far as they go, be true, he does not state how the obstruction which he says defendant placed upon the railroad track, might or would have endangered human life. This was the gist of the offence charged. If the obstruction was sufficient to throw a passing train, or any part of it, from the track, the prosecution should at least have attempted to show that fact. The witness leaves this fact a matter entirely of inference, and we cannot say that such inference is necessarily inevitable from the facts deposed to by him, viz.: "I tried to throw the piece of railroad bar-iron off the track with my foot, but could not do it, and had to take my hands. One end of the iron bar was fastened under the rail on the north side, and rested on the rail on the south side of the railroad-track." A bar of iron which he could not move with his foot, and had to move with his hands, might prove no obstruction whatever to a railroad train in motion.

The evidence further shows that the obstruction was placed upon a track of the Texas and Pacific Railroad, in the city of Dallas and not far from the Union Depot. But it

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does not state whether it was upon a main track or a switch; nor at what speed cars were accustomed to move in passing the point of obstruction; nor are the track surroundings described, — that is, whether the track at the point in question was on level ground or upon an embankment. These facts were all susceptible of proof, and, in the absence of better evidence, were essential to show how human life was endangered.

When better and more certain proof can be had, mere inferences should not be indulged to deprive an individual of liberty. The State should establish by the best evidence every fact which is necessary to be established to warrant a conviction.

Reversed and dismissed.

JOHN T. HEATH v. THE STATE.

1. ACCOMPLICE TESTIMONY. — The evidence of one accomplice cannot be corroborated by that of another; and when, as in the present case, the inculpatory evidence consisted chiefly in the testimony of two accomplices, the jury should have been so instructed.
2. CHARGE OF THE COURT. — The law applicable to every legitimate deduction which the jury might draw from the evidence should be embodied in the instructions, no matter what opinion may be entertained by the court of the credibility of the evidence invoking the instruction. Therefore when in a trial for theft there was evidence tending to prove a *bona fide* purchase of the property by the accused, it was incumbent on the court to submit that issue in his charge; and an omission of this character, if excepted to at the time, is made error by an express provision of the Code of Criminal Procedure.
8. PRACTICE — “THE RULE.” — Large as is the discretion of a trial judge over the conduct of an examination and the enforcement of the rule to sequester witnesses not on the stand, it is not an arbitrary discretion; nor is the statute on the subject merely directory, or simply suggestive. When the enforcement of the rule is requested by a defendant, proper practice is to require the consent of his counsel to any relaxation of it, even as to a witness already examined, until the conclusion of the testimony. See the opinion *in extenso* on this subject.

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APPEAL from the District Court of Kaufman. Tried below before the Hon. G. J. CLARK.

Jointly with the appellant, the indictment charged D. C. Moore, B. B. Kaufman, and Buck Smith with the theft of a steer, the property of H. T. Nash. The two latter defendants were examined by the State, and the conviction was obviously attributable to their testimony, which implicated themselves at least as clearly as it did the appellant, who was alone upon trial. The statement of facts is quite lengthy, and a detail of the evidence is not deemed necessary to a clear comprehension of the rulings made. Appellant was found guilty by the jury, and his punishment assessed at two years in the penitentiary.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, and *Thomas W. Dodd*, for the State.

CLARK, J. The instructions asked by the defendant, to the effect that a conviction cannot be had on the uncorroborated testimony of two accomplices, while not drawn with legal accuracy, should have been given by the court with proper corrections and additions. The prosecution was supported chiefly by two witnesses, who had been indicted jointly with the defendant, and who, from their own testimony, participated in the commission of the act for which the defendant was on trial.

The general charge of the court, upon this point, instructed the jury that a conviction could not be had upon the testimony of an accomplice, unless corroborated by other testimony tending to connect the defendant with the offence committed, and that the corroboration was not sufficient if it merely showed the commission of the offence; but as more than one accomplice had testified on the trial, it was important that the jury should have been informed that, in the

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★ matter of corroboration, the testimony of one could not be invoked to aid the other, especially as the charge was excepted to and a counter-instruction asked to that effect. In the absence of such caution, the jury were not unlikely to found their verdict upon an illegal basis. *Roberts v. The State*, 44 Texas, 119; *Carroll v. The State*, 3 Texas Ct. App. 117.

As the evidence introduced by the State might tend to establish the theory that the defendant had in good faith bought the animal alleged to have been stolen, it was also incumbent upon the court, no matter what view he may have entertained as to the weight or value of the testimony, to have submitted that issue to the jury, as a part of the law applicable to the case. The charge should embody instructions applicable to every legitimate deduction that the jury may draw from the evidence. *Johnson v. The State*, 27 Texas, 758; *Maria v. The State*, 29 Texas, 698; *Bishop v. The State*, 43 Texas, 390; *Rogers v. The State*, 1 Texas Ct. App. 187. And in connection therewith the identity, or want of identity, of the maker of the bill of sale in evidence, with the witness J. W. Baker, should have been submitted to the jury, as a question of fact, under proper instructions.

The failure to give these special instructions asked by the appellant, and his exception to the general charge because it failed to state all the law applicable to the case, which exception was noted at the time, and duly saved by the bill of exceptions and assigned for error, requires a reversal of the judgment, in accordance with a plain statutory provision. Code Cr. Proc., art. 685; *Bishop v. The State*, 43 Texas, 390. These charges seem to have been refused because substantially given in the main charge; but upon a critical examination of the latter, we fail to find them embodied therein, either expressly or in substance.

While the law vests an enlarged discretion in trial judges as to the examination of witnesses and the enforcement of

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the rule, when the same has been requested by either party, yet this discretion is not arbitrary; nor is the statute giving the right merely directory, and to be disregarded at pleasure. As said by this court in the case of *McMillan v. The State*, decided at a former day of this term, *ante*, p. 144: "The right to enforce the rule is a right given by law, and it should neither be denied nor substantially abridged at the arbitrary discretion of the presiding judge." Being a right guaranteed by law, a defendant should not, after a request for its enforcement, be deprived of its benefit, unless it should clearly appear that no possible injury could result to him from its relaxation. These remarks are induced, not as condemnatory of the action of the court in this particular case, but for the purpose of calling attention to a provision inserted in our statutes for a wise purpose, and not as a mere suggestion to courts. After the enforcement of the rule has been requested, the proper practice is to require the assent of counsel to the discharge of a witness from the rule before the conclusion of the testimony, and, in case of refusal, to enforce the rule, notwithstanding the particular witness may have been examined.

The judgment is reversed and the cause remanded.

Reversed and remanded.

BART POWELL v. THE STATE.

THEFT OF ANIMALS—INDICTMENT.—Under an indictment for theft of an animal, the accused may be convicted of that offence, or of wilfully taking into possession and driving from its accustomed range live-stock not his own, without the consent of the owner, and with intent to defraud the owner thereof, which is made theft and a felony; or a conviction may be had for wilfully driving from its accustomed range live-stock not his own, without the consent of the owner, and under such circumstances as not to constitute theft, which offence is punishable as a misdemeanor. But before the Revised Code took effect a conviction for this last offence could not be had unless the indictment alleged the value of the animal, inasmuch as the fine was regulated thereby.

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APPEAL from the District Court of Uvalde. Tried below before the Hon. T. M. PASCHAL.

The opinion states the case.

J. C. Sullivan, W. T. Merriweather, and Jay Minter, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. Appellant was indicted, in the ordinary form, for the theft of one head of neat cattle. At the trial, and upon some arrangement with the district attorney, the particular terms of which seem not to have been understood alike by the respective parties, the appellant pleaded not guilty to the charge of theft, but guilty to the charge of driving the animal from its accustomed range. The court instructed the jury that this plea was accepted by the district attorney, and, as there was no evidence before them showing theft, they should return a verdict of not guilty as charged, but guilty of wilfully driving one head of neat cattle out of its accustomed range, the penalty for which, as stated by the court, being confinement in the penitentiary for any term not to exceed two years, or by fine not to exceed \$1,000, or by both fine and imprisonment at the discretion of the jury. The jury by their verdict acquitted the defendant of theft, but found him guilty "of wilfully driving the animal out of its accustomed range," and assessed his punishment at two years' confinement in the penitentiary; upon which verdict judgment was entered, and from which defendant prosecutes his appeal.

Under a general indictment for theft of an animal, defendant may be convicted of that offence, or of wilfully taking into possession and driving from its accustomed range live-stock not his own, without the consent of the owner, and with intent to defraud the owner thereof, which is made theft by statute and punishable as a felony (Pasc.

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Dig., art. 2410*b*); or of wilfully driving from its accustomed range live-stock not his own, without the consent of the owner, under such circumstances as not to constitute theft, which is punishable as a misdemeanor, by fine not exceeding double the value of such stock. Pasc. Dig., art. 2410*c*. But in order to convict under the last-named statute, the value of the animal must be alleged in order that the proper penalty may be affixed. *Marshall v. The State*, 4 Texas Ct. App. 549; *Campbell v. The State*, 42 Texas, 591; *Bawcom v. The State*, 41 Texas, 189; *Counts v. The State*, 37 Texas, 594.

From the designation of the offence of which defendant pleaded guilty, as it appears in the charge and in the verdict and judgment, we must necessarily conclude, therefore, that defendant pleaded guilty to the offence denounced in art. 2410*c*, Paschal's Digest, above recited, and not to the graver offence specified in the preceding article. Certainly the designation of the offence in the verdict of the jury, as quoted above, cannot be held to designate and include the graver offence. The material elements of a want of consent of the owner and the intent to defraud are found, in the designation of the offence confessed by the defendant, neither in the charge of the court nor in the verdict and judgment.

The judgment must therefore be reversed; and as the defendant was acquitted by the verdict of the jury of the graver offence of theft, and as the indictment will not sustain a conviction for the lesser offence, because it fails to allege the value of the animal, the cause is dismissed.

Reversed and dismissed.

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SAM OWENS *v.* THE STATE.

THEFT OF ESTRAYS — CHARGE OF THE COURT. — An estray animal is under the protection of the law, and may be the subject of theft if the accused, knowing it to be an estray and its owner unknown, and without compliance with the laws regulating estrays, takes and appropriates it to his own use without the owner's consent and with intent to deprive him of its value. It is no defence that the estray was delivered to the accused by a person who had taken it up but had not estrayed it. See instructions held correct and sufficient on this state of case.

APPEAL from the District Court of Houston. Tried below before the Hon. W. D. WOOD.

The opinion discloses the case, and sets out the instructions in question.

Moore & Burnett, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. This appeal is from a judgment of conviction for theft of a gelding named in the indictment to be "the corporal personal property of some person to the grand jurors unknown." On the trial in the District Court, the presiding judge was requested to charge the jury as follows: "If the evidence does not establish the fact that defendant fraudulently obtained the possession of the horse from Allen, and that the horse was in the possession of Allen, then you will acquit the defendant. Theft is a fraudulent taking of personal property from the possession of the owner, and, in order to convict, this fraudulent taking must be proved beyond a reasonable doubt. If the jury believe that Allen had the possession of this horse, and that defendant got the horse from Allen fairly, and with no intent at the time to defraud the owner, you will find the defendant not guilty."

The judge refused these special instructions, and gives the following reason for so doing: "These charges are

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refused principally for the reason that they are substantially and in legal effect given in the general charge to the jury." The legal principle intended to be invoked in behalf of the defendant in these special instructions is that embraced in art. 727 of the Penal Code, to the effect that to constitute theft "the taking must be wrongful, so that if the property came into the possession of the person accused of theft, by lawful means, the subsequent appropriation of it is not theft." But this is not the entire article; proceeding from the close of that portion quoted, the remainder of the article is as follows: "but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offence of theft is complete."

Bearing in mind that the prosecution was for the theft of stray property charged to be the property of an unknown owner, we are of opinion the general charge sufficiently charged the jury as to the intent operating on the mind of the defendant at the time he obtained possession of the property, and required the jury to inquire into that intention at the time of the taking, so as to find whether the subsequent appropriation of it would complete the offence of theft or not; there being testimony going to show that the defendant had the animal in his possession and had sold it to another.

On the subject alluded to in the special charges refused, the court gave the jury the following instructions, not, it is true, as a modification of or to supply the place of those refused, but as a part of the law of the case as embraced in the general charge: "If you believe beyond a reasonable doubt from the evidence that the gelding's owner was unknown, and that the defendant knew this fact, and that with this knowledge the defendant took possession of the gelding with the intent to steal him, and, without comply-

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ing with the laws regulating estrays, sold said gelding, in such case, if you so find, the defendant is in law guilty as charged in the indictment. If from the evidence you believe the defendant did not know that the owner of the gelding was unknown, and that he bought said gelding from Bob Allen, or that Allen turned him over to him, defendant, and he, defendant, had no knowledge that the owner was unknown, then in such case, if you so find, you will acquit the defendant." And besides giving appropriate instructions on the presumption of innocence and reasonable doubt, the court gave this further charge: "If you believe from all the evidence in this case that the defendant did not intend, by what you find he did in connection with the gelding, to steal said gelding, you will acquit the defendant." The court charged, and properly we believe, to the effect that an stray animal is under the protection of the law, so far as theft is concerned, the same as property whose owner is known.

We are of opinion that the jury were properly instructed as to the law of the case as made by the testimony. There is no other alleged error so presented by the record as to require special notice; and, finding no material error, the judgment is affirmed.

Affirmed.

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H. M. PHARR v. THE STATE.

1. SELF-DEFENCE—CHARGE OF THE COURT.—Instructions on the right of self-defence should not limit the justification to the imminency of real danger, ignoring the appearance of imminent danger, in view of which the defendant may have acted.
2. MURDER IN THE FIRST DEGREE.—It is not all *homicide*, but all *murder*, committed in the perpetration or attempt at the perpetration of robbery, rape, arson, or burglary which is made murder in the first degree by our Penal Code. Malice, therefore, the characteristic element of all murder, cannot be dispensed with or ignored in a proper charge to a jury trying an

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indictment for murder so committed. But implied as well as express malice constitutes a murder so committed murder in the first degree.

8. CHARGE OF THE COURT. — No intimation of the opinion of the court upon the truth or falsity of any part of the evidence should be communicated to the jury, either by the charge or in any other manner.

4. ALLEGATA ET PROBATA. — The motive upon which a homicide was committed is more properly a subject of proof than of pleading.

APPEAL from the District Court of Johnson. Tried below before the Hon. J. ABBOTT.

By the indictment, the appellant, Henry M. Pharr, was charged with the murder of an unknown white man, on July 14, 1877, by shooting him with a gun. The case came to trial at the June term, 1879, when the jury found the defendant guilty of murder in the first degree, and judgment of death was rendered thereon in accordance with the law before the Revised Codes took effect.

The deceased was described in the indictment as an unknown white man, about twenty-five years of age, and none of the State's witnesses knew his name at the time of the trial. But Stephen Johnson, a witness for the defence, was able to give some account of him. The witness and others went from Blanco County to Kansas, in the spring of 1877, with a drove of cattle. In the latter part of June of the same year, he, with the defendant, a man named Lamb, and the deceased, whose name was Harrell, left Kansas together for Texas. They travelled in company until they got ten or fifteen miles below Fort Worth and ten or twelve north of Alvarado in Johnson County, when they separated. This was on or about July 13, 1877. The defendant and Harrell came on together towards Alvarado. The party had been earning \$30 each per month as drovers, but none of them had much money when they left Kansas. The defendant had more than any of the rest, and in the Indian Territory had let the witness have \$20, and afterwards a small sum at Fort Worth. Their necessary expenses from Kansas were about \$10 each. The deceased

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had a small pony worth \$10 or \$15, a six-shooter which he carried in his saddle-bag, and but very little money, at Fort Worth. The party played cards on their route from Kansas. The defendant, according to the witness, bore the character of a peaceable and quiet young man.

R. D. Richardson, a witness for the State, saw the defendant and the deceased the evening before the latter was killed. They came to witness's house, one and a half miles north-west from Alvarado. Defendant was riding a mule and had a gun; the deceased was riding a small pony and had no weapon in sight. They bought some forage from witness, and he saw them again the next morning as they passed his house going towards Alvarado. They seemed perfectly friendly to each other. On the 14th of July, 1877, being the day he last saw them together, witness saw the dead body of the deceased in Alvarado, and recognized it as that of the man who was with the defendant.

By other witnesses for the State it was proved that the defendant and the deceased were in Alvarado the day of the homicide, inquired there for the road to Hillsboro, and left together in that direction. About a mile and a half from Alvarado they were met by a witness, who was bringing melons to the village for sale. They bought two melons, for which the deceased paid, and witness saw that he had three currency bills folded together. They asked him about the Hillsboro road. They were next seen by another witness, who was travelling behind them in a wagon, and as near to them as two hundred yards. After they passed over a hill, which intercepted the witness's view of them, he heard the report of a gun or pistol, and as he drove on he saw some one run out from the bushes into the road, pick something up, and run back into the bushes. The witness thought nothing about it as he drove on, but, having gone on a mile or so and got a load of wood, he returned along the same road, and examined the spot and bushes to see what had been done there. Seeing blood in the road

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and on the bushes, he followed the trail, and came to the dead body of the deceased, who had on no hat, and whose shirt had been torn off. One of his boots was gone, and one pocket turned inside out. The leg upon which there was no boot seemed to have been hurt by a rope. Nothing in this witness's testimony identified the defendant as the person who fired the shot, or who ran out of the bushes into the road and back. Before he saw the body of the deceased it had been found by another witness, Mr. Walker, who lived close by. When found by him, there was a rope around the leg of the deceased, and his body was considerably bruised by dragging. He had been shot just behind the left ear, and the bullet came out on the right cheek, or, according to another witness, in the right temple. The body lay seventy-three yards from the road, and had been dragged from the road along a cow-path.

Thomas Coulter, a deputy-sheriff, testifying for the State, said that he had seen the deceased and the defendant, with their pony and mule, the day before the homicide; and hearing of that event, he and the others took the trail, and pursued it to Hillsboro and eight miles beyond, where they came up with the defendant. He was in company with another man, and was eating his supper by the side of the road. The witness arrested him, and took him back to Hillsboro. Some of the party told the defendant the cause of his arrest, and, after leaving Hillsboro the next morning, "defendant," says the witness, "admitted to me that he had killed deceased, but said he had killed him in self-defence, though defendant had previously denied that he had done the killing. * * * He stated that he and deceased had travelled together from Kansas, and had been playing cards, and that he (defendant) had won the pony of deceased at cards; and that on the morning of the killing they were riding along, and got into a conversation about the pony defendant had won, when the deceased told the defendant that he had to give him back his horse. Defend-

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ant replied that he would not do it, when deceased said, 'Well, I will kill you then,' and immediately reached his hand into his saddle-bags to get his pistol; and, believing that deceased was going to kill him, he stopped his mule, which threw deceased a little ahead of him, when he raised his gun and shot deceased. * * * That after he had killed the deceased he started back to Alvarado to give himself up to the officers, and got about half a mile from the place of the killing, when he met a man in the road, whom he asked how far it was to Alvarado. Defendant stated that after meeting this man he went on in the direction of Alvarado, but, being alone and a stranger, he became frightened, and concluded to go on home." The defendant, when arrested, had the pony and saddle-bags which the deceased had had, a six-shooter, some clothing in the saddle-bags, three five-dollar bills, and three twenty-five-cent bills.

L. E. Easley, for the defence, stated that on the morning of the killing he was going from Alvarado to mill, and about a mile and a half south of Alvarado met the defendant, who was coming in the direction of Alvarado. Defendant was riding a pony in a gallop, but stopped and asked witness how far it was back to Alvarado. Witness told him the distance, and defendant galloped on towards Alvarado. Where they met was between a quarter and a half a mile towards Alvarado from the place where the deceased was killed.

Quite a number of witnesses appeared for the defendant, who had known him well in Blanco County for several years previous to the homicide. They concurred in giving him an excellent character as a peaceable and quiet boy. The opinion discloses all other facts of any note.

Brown, Hall & Ramsey, and Jack Davis, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. We are of opinion there are errors of a material character prejudicial to the rights of the defendant

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in the charge of the court. The charge of the court on homicide in self-defence was substantially the law of homicide on previous threats, which was not the law of the case as made by the testimony adduced on the trial. The defence, if any was proved, was a killing on appearances of pressing and imminent danger, which, if true, would have justified the defendant to act, and have required him to act with the utmost promptness; and this view of the case should have been presented to the jury in the charge of the court. *Marnoch v. The State*, decided by this court at the present term, and authorities there cited, *ante*, p. 269. By the charge as given, the defendant was restricted to acting only on real danger, and not on the appearances of danger as they presented themselves to him at the time.

Again: the court charged, in effect, that if the jury believed that the unknown white man described in the indictment died from the effects of a gunshot wound inflicted on him by the defendant as charged in the indictment, and that such killing was unlawful as in the charge explained, and was committed in the perpetration or in the attempt at the perpetration of robbery as before explained, then the jury were instructed to find the defendant guilty of murder in the first degree. The defect in this portion of the charge is that it ignores malice, the indispensable requisite in all murder; without malice, either express or implied, there can be no murder. Again: it is not homicide committed in the perpetration or attempt at the perpetration of robbery which is by the Code murder in the first degree, but it is all murder committed in this manner that constitutes the crime murder in the first degree. If a murder — that is, a homicide — was committed in the perpetration or in an attempt at the perpetration of robbery, and having the necessary ingredient of malice, whether express or implied, such killing would be murder in the first degree. Penal Code, art. 606; *Tooney v. The State*, 5 Texas Ct. App. 163.

And again: the charge does not place and keep before

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the minds of the jury the distinction between murder generally on express malice, and murder committed in the perpetration or attempted perpetration of robbery, so as to prevent the jury from confounding the two views of the case in determining the question of the guilt or innocence of the defendant under the proofs adduced. And again: after the court had given the jury an appropriate charge on circumstantial evidence, a qualification, to say the least unnecessary, was added, to this effect: "The same degree of certainty, however, is not required, except as to the intent with which the act is done, when the State offers in evidence, without objection on part of defendant, the admissions or confessions of the defendant, provided the same show that the defendant admitted or confessed that he did the act of killing."

We deem it important to notice another error in the charge, which is as follows: "While it is the duty of the jury to weigh and consider all the statements of the defendant that have been offered in evidence, they may act upon and believe such part or parts of the same as they believe, from all the facts and circumstances in evidence, to be entitled to credit or worthy of belief, and may disregard such part or parts as they deem unworthy of belief." This portion of the charge was calculated to neutralize a previous portion, which was substantially correct, to this effect: "When the admissions or confessions of a party are introduced in evidence by the State, then the whole of the admissions or confessions are to be taken together, and the State is bound by them unless they are shown to be untrue by the evidence; such admissions or confessions are to be taken into consideration by the jury as evidence, in connection with all the other facts and circumstances of the case." It must be borne in mind that the whole defence of the defendant rested on the fact that he had said he had killed the deceased, but did it in self-defence, coupled with that other portion of the same statement drawn out on

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the cross-examination of the witness who testified to it, and which, coming as it did, was legitimate testimony to go to the jury, to the effect that when the deceased said he would kill the defendant he was attempting to get his pistol, when the defendant raised his gun and fired. Now, all this may have appeared to the court to be a mere pretence and fabrication; but if so, the court should not have conveyed to the jury, by any word in the charge, or in any other manner, what his impressions really were as to any part of the testimony.

It seems to us that by that portion of the charge which permitted the jury to consider the testimony of the statements of the defendant they were authorized to believe so much of his statement as admitted the killing, and reject such portions as set up his justification for the act of killing, and which arose out of the testimony introduced by the State. "When part of an act, declaration, or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, — as when a letter is read, all other letters on the same subject between the same parties may be given. And when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing, which is necessary to make it fully understood or to explain the same, may also be given in evidence." Code Cr. Proc., art. 751. It is the province of the judge to deal with the law of every criminal case, but he is not at liberty to express any opinion as to the weight of evidence, and it is beyond the province of a judge sitting in criminal causes to discuss the facts. Code Cr. Proc., arts. 677, 678. "The jury are the exclusive judges of the facts in every criminal case, but not of the law in any case. They are bound to receive the law from the court, and be governed thereby." Code Cr. Proc., art. 676; *Stuckey v. The State*, decided at the present term, *ante*, p. 174.

The sufficiency of the indictment is called in question by the

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appellant's counsel, and we are referred to *Tooney v. The State*, 5 Texas Ct. App. 163, in support of the argument; the argument being that the indictment is not sufficient to support a conviction for murder committed in the perpetration or attempt at the perpetration of robbery, that fact not being specially averred in the indictment. There is a clearly definable difference between the two indictments, and *Tooney's Case* does not sustain the argument. The indictment in the present case is believed to be sufficient as one for murder in the ordinary form. As to the motive or inducement which influenced the killing, that is more a subject of proof than pleading.

For the above errors in the charge of the court, the judgment is reversed and the cause remanded.

Reversed and remanded.

J. DAUGHERTY v. THE STATE.

1. CHANGE OF VENUE. — Though the application and affidavits for a change of venue be in strict compliance with the provisions of the Code, it does not follow that an order therefor must be made. The Code provides that the "truth and sufficiency" of the alleged causes shall be determined by the court.
2. SAME — PRACTICE IN THIS COURT. — Heretofore, under the law prior to the Revised Codes, this court established the rule that the refusal of a change of venue was subject to revision on appeal, but would not be disturbed unless it was shown that the discretion of the court below had been abused to the prejudice of the legal rights of the defendant. How this rule may be affected by the provisions of the Revised Code of Criminal Procedure on the subject is a question not involved in the present case.

APPEAL from the District Court of Kaufman. Tried below before the Hon. G. J. CLARK.

The trial and conviction were for theft of a horse, and the punishment assessed was five years in the penitentiary.

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J. T. Ward, Z. T. Adams, and H. P. Teague, for the appellant.

Thomas Ball, Assistant Attorney-General, and *Thomas W. Dodd*, for the State.

WINKLER, J. Before the trial on the merits, the defendant moved the court to grant him a change of venue, on the ground that there existed in Kaufman County so great a prejudice against him that he could not obtain a fair and impartial trial; to which motion he made his affidavit, and supported it by the affidavit of three resident citizens of the county.

The court overruled the motion, and refused to order a change of venue; and to the ruling the defendant took a bill of exceptions, in which it is shown that a similar motion had been made in another case of a similar character, which had on the previous day of the court been contested, and by the court overruled; and the motion, as the court understood the counsel in the present case, was submitted to the court on the affidavits and proofs made in the case decided on the previous day. As to how the matter was, the counsel seem not to be agreed. In this state of affairs, the understanding of the court must prevail. In the bill of exceptions the testimony taken on the former motion, and all the papers, are set out, and from an examination of them we are of opinion there was no error in the ruling of the court on the motion.

Agreeably to the article of the Code of Criminal Procedure on the subject (art. 578), which provides for a change of venue on the application of the defendant, and supporting affidavits of others, it will be found that a change of venue does not necessarily follow the filing of the affidavits, though they be found to be in compliance with the requirements of the statute, but that the court shall determine the truth and sufficiency thereof; the language of the Code is, "the truth and sufficiency of which the court shall determine."

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In most of the States the application for a change of venue is addressed to the judicial discretion, and the matter is not deemed one pertaining to strict right (1 Bishop's Cr. Proc., sect. 72), and whether the action will be revised or not depends upon the statutes of the different States. With us the following rule was adopted by this court in *Noland v. The State*, 3 Texas Ct. App. 598: "Applications of this character must of necessity be confided, under the law, to the discretion of the judge who presides at the trial; and unless it should be made to appear that this discretion had been abused, or arbitrarily exercised, and to the prejudice of the accused, or so as to deprive him of some legal right, this court would not be warranted in interfering with his action. Still, such action is subject to revision on appeal." What effect recent legislation may have upon this question it is not necessary in this case to determine. Rev. Code Cr. Proc., art. 583. In the present case we fail to discover that the discretion confided in the judge has been abused in any material respect.

As to the application for a continuance, when we consider the materiality of the testimony, and the diligence used to obtain the missing testimony, in connection with the testimony adduced on the trial, and the other fact that some of the alleged absent witnesses testified at the trial, we are of opinion it was properly overruled. It is not material to notice any of the other errors complained of, further than to say they do not appear to be well taken. Finding no material error in the judgment, it is affirmed.

Affirmed.

Opinion of the court.

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C. M. DOWNS v. THE STATE.

1. **PRACTICE IN THE COURT OF APPEALS.** — An appeal was dismissed because no final judgment appeared in the record; but the appellant, at a subsequent day of the term, filed a certified copy of a final judgment which was rendered by the court below, and moved for a rehearing and that the cause be reinstated. The motion is sustained.
2. **BAIL-BOND.** — In August, 1876, the appellant, as a surety, executed a bail-bond conditioned for the appearance of his principal before the "Criminal Court of McLennan County." *Held*, that neither at nor since the date of the bond has there been a "Criminal Court of McLennan County" known to the laws of this State; wherefore the judgment below is set aside and the cause dismissed.

APPEAL from the District Court of McLennan. Tried below before the Hon. L. C. ALEXANDER.

Herring, Anderson & Kelley, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. At a former day of this term, viz., on the nineteenth day of November last, the appeal in this case was dismissed for the want of a final judgment in the lower court. Appellant has filed a motion to set aside the judgment of dismissal, and for a rehearing, and presents as part of his motion a correct certified copy of the judgment as it was rendered and appears in the minutes of the court below, from which it now appears that a final judgment was in fact rendered. This being the case, the motion to set aside the dismissal is granted, the cause reinstated upon the docket, and a rehearing had.

Proceeding now to pass upon the case as reinstated: because it appears that the appearance-bond which was forfeited, and upon which the judgment final was rendered, obligated the principal to "make his personal appearance before the honorable Criminal Court for McLennan County, Texas," and because there was at the date of the execution

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of said bond, nor since, no such court as that described known to the laws of the State (see *S. P. Smith et al. v. The State*, decided at the present term, *ante*, p. 160), the judgment rendered in the court below will be reversed and the case dismissed.¹

Reversed and dismissed.

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W. A. CROWDER ET AL. v. THE STATE.

1. BAIL-BOND. — The time when and place where the principal obligor is bound to appear must be stated in a bail-bond; but the time is sufficiently specified by the term of the court, and the place by the name of the court and the county. Stipulation that he will on a certain day appear before "said examining court," without designating the magistrate, is not sufficient.
2. FORFEITURE cannot be taken on a bail-bond prior to the day stipulated for the appearance of the principal obligor.

APPEAL from the County Court of Delta. Tried below before the Hon. S. M. GRANT, County Judge.

Hunter & Putman and *E. B. Perkins*, for the appellants.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. The assistant attorney-general moves to dismiss the appeal in this case for the reason that the appeal-bond is defective in that it omits the necessary helping verb "be" in the last clause of the condition, to wit, "shall prosecute his appeal with effect, and perform the sentence, judgment, or decree of the Court of Appeals, in case the decision of said court shall against the appellant." This, most clearly, is a clerical omission, and might easily be accounted for by the fact that the omission is of a word

¹ CLARK, J., did not sit in this case.

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coming between two, of which one is written at the bottom of one page and the other at the top of the next. In this case, however, we are not left in doubt, or to intendment and inference solely, as in *Carroll v. The State*, 6 Texas, Ct. App. 463, cited in support of the motion; because we have before us two transcripts sent up in this case, and by reference to the first we find the verb is properly set out in the bond. The motion cannot prevail, and is therefore overruled.

Upon the merits we find two errors fatal to the judgment, both of which spring out of the conditions of the bond executed by the principal for his appearance. The condition of the bond is, "that the said W. A. Crowder will make his personal appearance before said examining court on the 14th day of June, 1877, at 10 o'clock, and there remain from day to day until discharged by the court."

One of the requisites of a bail-bond is that "it state the time and place when and where the accused binds himself to appear, and the court before which he is to appear. In stating the time, it is sufficient to specify the term of the court; and in stating the place, it is sufficient to specify the name of the court and of the county." Pasc. Dig., art. 2732, subd. 5. Nowhere does the bond name the magistrate or justice of the peace who was holding the examining court in Precinct No. 1. The magistrate who was holding the examining court, and before whom the obligor was bound to appear, should have been stated in the bond.

Another defect fatal to the validity of the judgment here appealed from, as shown by the record, is that the justice forfeited the bond on the thirteenth day of June, 1877, one day before the principal obligated himself by the stipulations of the bond that he would make his appearance. By what authority the justice forfeited the obligation before the obligation was due does not appear, and could not be sustained if it did.

The two errors above were properly presented in the exceptions filed by appellant in the County Court, and that

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court should have sustained them both, and have quashed the bond as to the first.

The judgment is reversed, and because the appearance-bond is fatally defective the cause is dismissed.

Reversed and dismissed.

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| 37 | 211 |

J. RICHARDSON v. THE STATE.

1. PRACTICE. — After verdict it is too late to object, for the first time, that no copy of the indictment in a capital case was served on the defendant. Questions of this character, however, especially in capital cases, should always be obviated by a strict compliance with the injunctions of the law. If the defendant waives the copy, the better practice would be to take the waiver in writing, over his signature, and have it filed among the papers in the case.
2. SAME. — Defendant is not entitled to a list of talesmen summoned to complete the panel after the special *venire* has been exhausted.
3. MURDER — EVIDENCE. — It being in proof that the deceased, after being shot, was found close to the house of the defendant, and that there were spots of blood on the fence adjacent thereto, the prosecution asked a witness, "How did those bloody spots appear to have been made?" to which the defence objected that the question sought to elicit an opinion, not a fact. The objection was overruled, and the witness described the spots, and said they appeared to have been made with a bloody hand. *Held*, that the objection was properly overruled; the prosecution had the right to prove the appearance of the spots, and the question was a legitimate one to elicit the proof.
4. VERDICT. — The presence of the accused, but not that of his counsel, is necessary when the verdict is received.
5. JUSTIFIABLE HOMICIDE. — There is no positive definition of justifiable homicide, and, the justification being determinable by the circumstances of each particular case, the mere enunciation of the statutory provisions on the subject will often be inadequate in a charge to the jury.
6. SELF-DEFENCE. — The criterion of justifiable homicide in self-defence, or in defence of family or home, is not the actuality of impending danger, but the appearance and reasonable apprehension of such danger. Note in the opinion the elaboration of this principle.

APPEAL from the District Court of Smith. Tried below before the Hon. J. C. ROBERTSON.

Appellant was indicted for the murder of Michael See, by

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shooting him with a gun on the 7th of August, 1873. The trial was had at the September term, 1879, of the court below, and resulted in his conviction of murder in the first degree, and the assessment of his punishment at death.

It appears from the evidence that the deceased was a clerk of S. Wilkins, at Gladewater, who, on the 7th of August, 1873, dispatched him on horseback to Tyler in Smith County, instructing him to travel the direct road. Deceased took with him two derringer pistols, and about \$70. Late in the night of that day he was shot in or close to the yard of the defendant, a negro, who did not live on any public road to Tyler or elsewhere. It appears that the house was some three hundred yards from a road which leads to Tyler, and screened therefrom by timber; but it does not appear whether or not this was the direct road to Tyler from Gladewater.

W. S. Wimberly, upon whose plantation the defendant and other negroes lived, was awakened by some of them about midnight, and informed that some one had been shot at the defendant's. He dressed and repaired to the place, and found the deceased lying a few steps outside of the defendant's yard, but still alive. Henry Tucker told the deceased that he needed some attention, and asked if he could do any thing for him; to which the deceased replied, "Get away from me, and go to h—ll." Two derringer pistols and a bottle of whiskey were lying inside of the yard, and a horse was hitched at the gap, with saddle-bags on him. The deceased, when found, had on no pants, drawers, or shoes. These articles were found on the ground, just outside the yard. The pants and drawers were bloody, and had a hole through them below the waistband. A silver half-dollar and a dime were found in the pockets, but no other money.

Emily Johnson, a colored woman who lived with her husband about one hundred and fifty yards from the defendant's, testified that between eleven and twelve o'clock in the

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night of the homicide she heard some one halloo at their gate. Not knowing who it could be at that hour, she would not answer nor let her husband answer; and very soon she heard some one in her kitchen, and in a few minutes the door between her kitchen and bedroom was opened, and a man came in and advanced to the bed occupied by herself and husband, and looked into their faces, and then went to another bed, in which their little daughter and a young woman were lying, and got in the bed with them. Her husband got up and asked him, "In the name of God, stranger, what do you want?" at which the man jumped up, pulled a quilt over his head, and got under the bed. Her husband spoke to him again, and the man came out from under the bed and said he did not mean any harm and would not hurt them. He asked for water, and it was given him; and he then sent witness out of doors for his shoes, which he had pulled off and left there, and she went out and brought them in. He asked her husband to walk out with him, and offered him a pistol to defend himself with, if any harm was attempted. They went out, but stopped near the door, and the man told her husband he wanted a woman, and offered her husband half a dollar to get him one. Her husband refused; and the man then gave him a drink of whiskey, and asked him if there were any other negro cabins close by. Her husband told him the defendant lived about one hundred and fifty yards distant, and had two daughters. The man tried to get her husband to go with him to defendant's, and, being refused, got on his horse and started in that direction, telling her husband that if there were no girls at the defendant's he would come back and kill him. Witness's husband started to Mr. Wimberly's, in an opposite direction from the defendant's, to inform Mr. Wimberly of the man's conduct, and witness and her children went out in the field and hid. About half an hour after the man left her house, she heard a gun at the defendant's house; and on going down the next morning,

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saw the deceased, and knew him to be the same man who was at her house on the previous night. She heard him groaning through the night, and last heard his groans when the chickens were crowing for day. When witness got to defendant's he was not there; he had run off. Her husband had departed life since the homicide.

Alf. Tucker, who at the time of the homicide lived about a mile east of Tyler and about seven miles west of the defendant's, testified that, about daylight in the morning after the killing the defendant came to his house, and, after some casual conversation, said there was a man killed at his house last night. Witness asked by whom; and the defendant replied that his wife killed the man, who was either trying to ravish her or to break into the house; witness could not remember which was the reason stated by the defendant. Witness told him, d—n him, he ought to have killed the man himself, and not let his wife do it. Defendant asked whether the prosecution would go easier against him or his wife. Defendant said he left after the man was killed, but afterwards went back and found a roll of money, amounting to \$60 or \$70, in the road in front of the house, and took it. Witness had known the defendant for about two years prior to the homicide; and did not remember ever mentioning the interview with him until the morning of the day on which he was examined at this trial.

Matters immediately involved in the rulings are stated in the opinion.

Horace Chilton, who defended the appellant by appointment of the court below, filed in this court an able and forcible brief and argument.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. In capital cases, it is provided that "no arraignment shall take place until the expiration of at least two entire days after the day on which a copy of the indictment was served on the defendant, unless the right to such

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copy or to such delay be waived, or unless defendant is on bail." Rev. Code Cr. Proc., art. 510. We apprehend, however, that no case can be found holding that the objection of no service of such copy can be raised for the first time, as in this case, on motion for a new trial. True, in the case of *Record v. The State*, 36 Texas, 521, it is intimated that such practice was proper, but the exact question was not raised, nor was it essential that it should have been passed upon in that case. Wherever it has been properly submitted, it has been held that it was too late to interpose such objection after verdict and in a motion for a new trial. *Roberts v. The State*, 5 Texas Ct. App. 141, and authorities cited.

Such questions should not be permitted to arise, and especially in capital cases; because, in addition to his constitutional right, upon demand, to have a copy of the nature and cause of the accusation against him (Const., art. 1, sect. 10), the statute prescribes that "in every case of felony, when the accused is in custody, or as soon as he may be arrested, it shall be the duty of the clerk of the court where an indictment has been presented, immediately to make out a certified copy of the same, and deliver such copy to the sheriff, with a writ directed to such sheriff, commanding him forthwith to deliver such certified copy to the defendant." And the sheriff is required to execute and return "the same, with his indorsement thereon showing when and how the same was executed." Rev. Code Cr. Proc., arts. 504, 505. Whilst it is true that this privilege and right may be waived by a defendant, his having done so should not be left in uncertainty; but the better practice would be to have the waiver reduced to writing, signed, and filed with the papers of the case. If the objections as here presented in the bill of exceptions had been urged before a plea was entered, a refusal to have granted it would have required a reversal of the judgment. *McDuff v. The State*, 4 Texas Ct. App. 58.

A second error complained of is, that out of a special

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venire ordered of forty-eight men only sixteen were summoned. Defendant asked that, on account of the great disproportion in the number summoned, the trial should be postponed until another day of the term, and another special *venire* ordered, returnable on that day; or that the case be continued. This application was refused and the trial proceeded, five jurors being obtained out of the sixteen, and the court ordering the sheriff to summon talesmen to fill the panel. As shown by the bill of exceptions, we cannot determine whether or not the officer has failed or neglected to do his duty. The return of the sheriff on the writ for the special *venire* should have been made an exhibit to the bill. Rev. Code Cr. Proc., art. 614. In the absence of this return, we must presume that the officer did his full duty. Upon a similar question in the case of *Johnson v. The State*, 4 Texas Ct. App. 268, it was said: "In proportion to the number of the special *venire*, we admit that the deficit [fourteen out of thirty-six] is quite large; and the proper and better practice, where there is a large deficiency, doubtless is to order the talesmen, and, after they have also been summoned, to then have the defendant served with the full list so completed. We know, however, of no provision of the statute requiring this to be done; in fact, the law seems to be defective in that it provides for no such contingency. No such right being accorded to defendant, and his objection failing to show that the jury as selected, or any individual juror, was wanting in any of the qualifications prescribed by law, this court will not revise and reverse the action of the lower court in this particular, when, to say the least of it, the action was not illegal." The same rule was held in *Roberts v. The State*, 5 Texas Ct. App. 141. See also *Boyett v. The State*, 2 Texas Ct. App. 93; *Harris v. The State*, 6 Texas Ct. App. 97.

Admission of the confessions of defendant in evidence is also complained of, but there is nothing to indicate that they were not freely and voluntarily made, and it is not

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attempted to be shown that defendant was under arrest at the time. Rev. Code Cr. Proc., arts. 749, 750.

Nor did the court err in admitting the evidence disclosed in the third bill of exceptions. The witness was asked with reference to three spots of blood which he had seen on the top rail of the fence at the place of ingress and egress to defendant's yard, the question propounded being, "How did those bloody spots appear to have been made?" The witness testified that they appeared to have been made with a hand. We can see no good reason for excluding the evidence, nor can we imagine how the fact that the witness was asked and stated how the matter appeared to him affects its admissibility; for in testifying to such physical facts a witness cannot well testify otherwise than as to appearances, and the impressions created upon his mind from the appearances as to the causes producing them.

Another supposed error is that the verdict of the jury was received and entered during the absence of the counsel of defendant. Whilst our Code of Procedure requires the presence of the defendant at the reception of the verdict in all felony cases (Rev. Code Cr. Proc., art. 711), there is no similar rule provided with regard to counsel; and the rule is, on the other hand, that it is not error to receive the verdict in the absence of defendant's counsel, the defendant himself (as was the case in this instance) being present and suffering no prejudice. *Beaumont v. The State*, 1 Texas Ct. App. 533; *Summers v. The State*, 5 Texas Ct. App. 365.

Several objections are urged to the charge of the court; and in our opinion, after defining murder of the first and second degree and manslaughter, it does not present the law applicable to other phases of the case as made by the evidence in as clear, terse, and pointed a manner as would enable a jury of ordinary understanding to fully grasp and comprehend it. Besides this, it submitted issues not raised, as far as we can see from this record, by the testimony ad-

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duced on the trial. And again, upon the two main features of the defence, viz., self-defence and justifiable homicide in defence of one's habitation, the law is more favorable to the accused than as it is found enunciated in the charge.

There is no positive rule for the definition of justifiable homicide. It must depend upon the circumstances and surroundings of each particular case, and a mere declaration or enunciation of the rules prescribed in the statute will in many instances fall short of filling the measure of the law as it has been interpreted and thoroughly established by precedents and authority of long and recognized standing. A defendant is always justifiable in acting for his defence, or the defence of his family or property, according to the circumstances as they reasonably appear to him, and it is but just and right that his action should be judged of in the light of the circumstances as they appeared to him at the time. Such is our understanding of the law, and such the rule of decision in this State. It is not necessary that there should have been actual danger, provided the party acted on a reasonable apprehension of danger. *Munden v. The State*, 37 Texas, 353; *Horbach v. The State*, 43 Texas, 242; *Cheek v. The State*, 4 Texas Ct. App. 444; *Blake v. The State*, 3 Texas Ct. App. 581; *May v. The State*, 6 Texas Ct. App. 191; *Marnoch v. The State*, decided at the present term, *ante*, p. 269.

Defence of one's habitation is a right only limited in extent by the same rules which govern in the defence of the person. If we recur to the common law, we will find that even there a party committing homicide while defending his dwelling-house against an assault, actual and positive, was held guilty of no higher grade of homicide than manslaughter. 1 Hale's P. C. 485, 486; East's P. C. 287, 321; Hawk. P. C. 83.

In *Mead's Case*, 1 Lew. C. C. 184, Holroyd, J., said that "a civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or in anger. If a person takes forcible possession of another's close, so as to be

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guilty of a breach of the peace, it is more than a trespass. So if a man with force invades and enters the dwelling of another. But a man is not authorized to fire a pistol on every invasion or intrusion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making of an attack upon a man's dwelling, and especially in the night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle, and therefore in the eye of the law it is equivalent to an assault."

It seems to us that the conclusion reached by the Supreme Court of Alabama in the well-considered case of *Carroll v. The State* is a most clear and forcible declaration of the correct rule by which to determine how far a person is protected in the defence of his dwelling. Goldthwaite, J., delivering the opinion, says: "It is conceded most fully that if the evidence shows an assault upon the house or the person, under circumstances which would create a reasonable apprehension—that is, a just apprehension—in the mind of a reasonable man of the design to commit a felony with force, or to inflict a personal injury which might result in loss of life or great bodily harm, the danger of the design being carried into execution being imminent and present, the person in whose mind such an apprehension is induced, or over whose person or property such danger is impending, may lawfully act upon appearances, and kill the assailant. The law would not in such a case require that the danger should be real, that the peril should actually exist, but it does require that the appearances shall be such as would excite a reasonable apprehension of such peril; and if such appearances do not exist, the killing would be either murder or manslaughter." 23 Ala. 28; Hor. & Thomp. on Self-Defence, 804. The same doctrine is held in *Pond v. The People*, 8 Mich. 150; Hor. & Thomp. on Self-Defence, 814.

The second special instruction asked for defendant in the

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case we are considering was the law as far as it went, and should have been given, or, in lieu thereof, a charge submitting the law as it is above laid down.

Because the charge of the court did not sufficiently present the law applicable to the case on the principal issue made by the defence, the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

JOHN COX v. THE STATE.

1. RECORD — AMENDMENT. — On the retrial of a felony case which had been reversed on appeal, the defence moved to set aside the indictment because the fact of its presentment in open court by the grand jury, a *quorum* being present, did not appear upon the minutes of the court as required by law. The State moved to amend the minutes in this respect, and, to prove the fact, introduced the person who was foreman of the grand jury who found the indictment, and also the clerk who filed it. It appears by bill of exceptions that the motion to amend was sustained by the court, but no amendment of the minutes was in fact made. *Held*, that the motion to set aside was opportune notwithstanding the defendant's plea of not guilty at his first trial, and the other proceedings thereat, and that no amendment of the minutes having been made the record fails to show the necessary fact that the indictment was presented in accordance with law, and the conviction cannot stand.
2. SAME. — Note parol evidence held insufficient to warrant the amendment of the minutes of the court below at a subsequent term. Such amendments should be made *nunc pro tunc*.
3. NEW TRIAL. — When a new trial is awarded on appeal, the *status* of the case in the court below is the same as if the new trial had been granted there, and the same as before any trial was had.

APPEAL from the District Court of Falls. Tried below before the Hon. L. C. ALEXANDER.

The indictment and conviction were for theft of a steer. All facts relevant to the rulings appear in the opinion. The assistant attorney-general moved for a rehearing; pending

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which motion the appellant made his escape, and the appeal was dismissed.

Goodrich & Clarkson, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State. After the defendant had pleaded to the indictment, he could not be heard on a motion to quash it on account of irregularities in the action of the clerk. *Carter v. The State*, 12 Texas, 502; *Terrell v. The State*, 41 Texas, 466; *The State v. Clarkson*, 3 Ala. 378.

On motion of the prosecution, the court below corrected its record. This was within its power. *Terrell v. The State*, 41 Texas, 466.

WHITE, P. J. This is the second time this case has been before us on appeal. It was reversed on the first appeal, for error in overruling defendant's application for continuance. 5 Texas Ct. App. 119.

After its reversal and when the case was again called for trial, on the 24th of March, 1879, and before defendant pleaded, he presented his motion to quash the indictment because the minutes of the court did not show that any such indictment was ever presented by a grand jury in open court. As set out in the transcript, the action of the grand jury is thus related, viz.: "On this the 14th day of September, A. D. 1877, the grand jurors, headed by their foreman, Zenos Bartlett, presented the following bills of indictment, to wit." Immediately follows a statement of the style, number, and offence in each bill so returned and presented. Several of these bills, including the one in this case, were against appellant and one Tom Weathers jointly. In placing his file-number upon the bills, the clerk had placed the number 735 upon this particular bill, whereas it appears that that number properly belonged to another case, entitled "*The State of Texas v. W. T. Millan and Frank Galloway.*"

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In response to defendant's motion to quash, the county attorney moved the court "that the minutes of the September term, 1877, be so amended and corrected that the same will show that the indictment filed in this case was presented in open court by the grand jury, and that the minutes of said term be so corrected and amended that the file-number of this indictment will correspond with said minutes."

The bill of exceptions then recites that "Zenos Bartlett was sworn, and testified before the court that he was foreman of the grand jury at the September term, 1877, of the District Court of Falls County; and that he brought all of the indictments signed by him into open court and delivered them to the judge; that the signature to this indictment as foreman of the grand jury is his own signature. He remembers finding a bill of indictment against Cox and Weathers, but don't remember this particular bill of indictment; but brought into open court all that were found by the grand jury. He don't remember that a *quorum* of the grand jury was always present; that the names of the grand jury were called. Don't remember finding more than one bill against defendant. Jesse Scruggs, sworn, testified that he was clerk of this court at its September term, 1877, and the indictment in this cause being handed him he testified that the file-mark is in his handwriting and the signature thereto is genuine; that he never filed any indictment except those handed him by the presiding judge in open court."

Defendant then read in evidence from the minutes of the court the only entry of the recital of the presentment, as we have copied it above, and the list of indictments running from numbers 721 to 735 inclusive.

In certifying the bill of exceptions the judge makes the statement that he sustained the motion of the county attorney to amend the records so as to show a proper presentment, "because it appears from the record and evi-

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dence that the indictment herein (to which the defendant has heretofore pleaded) was presented in open court by the grand jury, a *quorum* being present, at the September term, 1877; because it appears from the minutes of the court that six, and only six, indictments were presented against said John Cox and Tom Weathers at said term, and that the same number appear on the docket from 730 to 735 inclusive; that the number is no part of the indictment, and it is evident that the variance in the file-number was a mistake of the clerk."

Now it appears that after the motion of the county attorney was thus sustained by the court the record itself was never amended or corrected, and that the only entry of the presentment remained unaltered as first made. It seems to be settled that where a record is in itself ambiguous, parol evidence may be introduced to explain but not to falsify or contradict it. *Vestal v. The State*, 3 Texas Ct. App. 648. In this case the court did not perhaps transcend the rule, since it appears that an omission of a further statement on the part of the clerk, additional to what he did state, had created the doubt as to the proper presentment. *Terrell v. The State*, 41 Texas, 463.

The questions before us are: if the parol evidence was admissible, was it sufficient in its establishment of the fact desired to be proven? and, if sufficient, has the record been amended and corrected so as to meet and overcome the objection originally interposed? We are inclined to think that both these questions should be answered negatively. The evidence as detailed is entirely indefinite and unsatisfactory when sought to be used for so important a purpose as that of amending a court record in a matter of importance to the validity of its proceedings. And if it had been sufficient, its introduction and the proof of the omitted facts were not alone all that were required to make the record speak the facts necessary to be shown before it could be said to be complete. If the evidence was sufficient and

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complete, the court should then have gone further, and had the entry of the records amended in fact, so as to show in terms an actual presentment of the indictment by the grand jury in open court, a *quorum* being present. This has not been done. But so far as appears by the record, which is required to be perfect and complete within and of itself and to import verity, it remains as it was originally when the objection was taken; it has never been altered, corrected, or amended.

In the case of *Croswell v. Byrnes*, 9 Johns. 286, on the issue of *nul tiel record*, the record of a judgment was produced; to rebut which the plaintiff produced a rule of the court subsequent to the judgment, setting it aside for irregularity. It was held that the entry of the rule on the minutes could not be received as evidence against the record, which imports verity and can be tried only by itself; "but the *vacatur* must be enrolled or entered of record. No proceeding is regarded as matter of record until it is enrolled."

The entry in this case, to be effectual, should have been made *nunc pro tunc*. *Burnett v. The State*, 14 Texas, 455; *Rhodes v. The State*, 29 Texas, 188. Our statute with regard to presentments of indictments by the grand jury reads, that "the fact of the presentment of the indictment in open court by a grand jury shall be entered upon the minutes of the proceedings of the court, noting briefly the style of the criminal action and the file-number of the indictment, but omitting the name of the defendant unless in custody or under bond." Acts 1876, p. 8 (Rev. Stats., Code Cr. Proc., art. 415). And this fact should appear in the transcript of the record for the Court of Appeals. Rules for District Court, 111. This entry must be affirmatively shown by the record, else a motion to quash the indictment upon that ground, made *in limine*, would, if overruled, according to the previous decisions of this court, be such error as would necessitate a reversal of the judgment. *Hardy v. The State*, 1 Texas Ct. App. 557; *Alderson v. The State*, 2

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Texas Ct. App. 10; *Houillion v. The State*, 3 Texas Ct. App. 537; *Denton v. The State*, 3 Texas Ct. App. 635; *Jinks v. The State*, 5 Texas Ct. App. 68; 7 U. S. Dig. (1st series) 401, sect. 727.

But it is insisted in behalf of the prosecution, and the same opinion seems to have been entertained by the learned judge who tried the case, as is shown by his explanation to the bill of exception, *supra*, that the defendant having once pleaded to the indictment and been convicted, the objection came too late when it was interposed, and defendant could not at that stage of the proceedings avail himself of it. In this view we cannot concur. True, he pleaded not guilty on the first trial, was convicted, and appealed, without any mention having been made of this defect in the record. But the case was reversed on appeal, and remanded for a new trial. The statute reads: "Where the Supreme Court [Court of Appeals] awards a new trial to the defendant, the cause shall stand as it would have stood in case the new trial had been granted by the District Court [court below]." Pasc. Dig., art. 3216; Rev. Stats., Code Cr. Proc., art. 876. And "the effect of a new trial is to place the cause in the same position in which it was before any trial had taken place." Pasc. Dig., art. 3139; Rev. Stats., Code Cr. Proc., art. 783. On the new trial, defendant made his motion at the very earliest stage of the proceedings.

It is unnecessary that we should discuss the other errors complained of. Because of the error committed by the court as above shown, the judgment is reversed and the cause remanded for a new trial.¹

Reversed and remanded.

¹ CLARK, J., having been of counsel in the lower court, did not sit in this case.

COURT OF APPEALS OF TEXAS.

GALVESTON TERM, 1880.

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D. H. FRANCIS v. THE STATE.

1. **LAND FORGERY.** — *Ham v. The State*, 4 Texas Ct. App. 645, approved in so far as it maintains the constitutionality of sect. 5 of the act of 1876 “to provide for the detection and conviction of all forgers of land-titles;” which section makes extra-territorial offenders amenable for violations of the act, and provides that indictments therefor may be presented “by the grand jury of Travis County, or in the county where the offence was committed, or in the county where the land lies about which the offences in this act were committed.” *Held further*, that the provisions of this section are embraced in the title of said act.
2. **SAME.** — A citizen of R. County, in this State, was indicted in Travis County for a land-title forgery committed in R. County after the passage of the act of 1876 “to provide for the detection and conviction of all forgers of land-titles.” *Held*, that, notwithstanding the laws which in general control the venue of criminal trials, the said act empowers the grand jury of Travis County to indict and the District Court of said county to try the defendant for the alleged forgery committed in R. County. It is immaterial where the offence was committed, provided it affected land in this State.
3. **EVIDENCE.** — The general rule requires that the evidence correspond with the allegations and be confined to the point in issue; but this does not exclude evidence which tends to prove the issue or constitutes a link in the chain of proof, though not of itself sufficient.
4. **SAME.** — When proof of guilty knowledge or intent is necessary, such facts may be shown as tend to establish such knowledge or intent, notwithstanding they are merely collateral or may themselves constitute a distinct offence. Therefore in a trial for forgery of a transfer from S. to B. it was competent for the State to introduce the conveyance to S. from one T., and prove that it and the certificate of acknowledgment thereto were forgeries.
5. **SAME — CHARGE OF THE COURT.** — But when evidence of collateral facts or of a distinct offence is admitted as proof of the guilty knowledge or intent of the accused, the charge of the court should apprise the jury of the legitimate scope and purpose of such evidence, and thus guard them against treating it as proof of the *corpus delicti*.

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6. **SAME.**—A charge to the jury, though composed of excerpts from the Codes, is defective and erroneous in a trial for felony if it gives no instructions which may enable the jury to apply the law to the facts in proof and to the issue of guilty or not guilty.

APPEAL from the District Court of Travis. Tried below before the Hon. E. B. TURNER.

The indictment charged the appellant with the forgery of a transfer from William Smith to R. W. Bell of a land-certificate issued to one John Todd. The offence was alleged to have been committed in Robertson County, on April 20, 1877. In a second count, which was abandoned by the prosecution, the appellant was charged with uttering and passing as true the said forged transfer. The material allegations of the count on which the trial was had appear in the opinion. The jury found the defendant guilty, and assessed his punishment at five years in the penitentiary.

The forged instrument was as follows:—

“THE STATE OF TEXAS, }
County of Robertson. }

“Know all men by these presents that I, William Smith, of the city of New Orleans, Louisiana, for and in consideration of the sum of one hundred and thirty dollars to me in hand paid by R. W. Bell of Robertson County, Texas, the receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto the said R. W. Bell, his heirs and assigns, all my right, title, and interest in the certain bounty-warrant of the State of Texas number fifty-five, for six hundred and forty acres of land in said State, issued to John Todd the sixth day of October, A. D. 1859, by said State,—to have and to hold unto the said R. W. Bell, his heirs and assigns forever, in fee-simple. And I, the said William Smith, will, and my heirs, executors, and administrators shall, the right and title of said warrant and land to the said R. W. Bell, his heirs and assigns forever, warrant and defend against the claims of

Argument for the appellant.

ourselves, or the lawful claim of any person or persons whatsoever. Witness my hand this twentieth day of April, A. D. 1877. WILLIAM SMITH."

The evidence is quite elaborate, and in a great degree circumstantial. Its sufficiency not being involved in the rulings made, there is no occasion for a detail of it, as the opinion indicates the facts with which it deals.

John B. Rector and *E. C. Saltmarsh*, for the appellant. The court erred in overruling the exception to the indictment, that the statute under which it was found, and particularly sect. 5 thereof, was unconstitutional and void.

The proper county for the prosecution of offences is that in which the offence is committed. Pasc. Dig., art. 2676.

"No citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." Const. 1876, sect. 19, Bill of Rights.

"Nor shall any State deprive any person of life, liberty, or property, without due process of law." Const. U. S., art. 14, subdiv. 1.

The indictment alleged the offence to have been committed in Robertson County, and hence the application of these constitutional provisions was raised by the exceptions referred to. "The right of trial by jury shall remain inviolate." Const. 1876, sect. 15, Bill of Rights.

What sort of a jury is guaranteed beyond the reach of the Legislature? We answer, a jury as known to the common law, — a jury of the vicinage *parium suorum*. Unquestionably the Legislature cannot depute to German citizens of Texas the exclusive right to try American-born citizens of the State; nor could they reverse the proposition. Can the Legislature, as this law of 1876 attempts to do, force a citizen, for example, of Sabine County, who is charged with a forgery in the county of his residence, to the capital at Austin for trial among strangers? "Any less

Argument for the appellant.

than this number of twelve would not be a common-law jury, and not such a jury as the Constitution guarantees to accused parties." Cooley's Const. Lim. (2d ed.) 318. "Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses." Cooley's Const. Lim. (2d ed.), tit. "Trial by Jury," marg. pp. 319, 320. See Sedgw. on Stat. & Const. Law, 542; 2 Kent's Comm. 5, 6, 13 (12th ed.). "The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. The people would be made to say to the two houses, you shall be vested with the legislative power of the State, but not one shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do wrong unless you choose to do so." Cooley's Const. Lim. (2d ed.) 354, marg. notes 1, 2; Sedgw. on Stat. & Const. Law, 534-546, and note on p. 539; *Pennoyer v. Neff*, 5 Otto, 714; 2 Kent's Comm. (12th ed.) 5, 6, 13; *Taylor v. Porter*, 4 Hill, 144; *Jones v. Perry*, 10 Yerg. 59; *Ervine's Appeal*, 16 Pa. St. 256; *The State v. Doherty*, 60 Me. 509. "On the other hand, we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. * * * The whole community is entitled at all times to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interfer-

Argument for the appellant.

ence may be under a rule impartial in its operation. It is not the partial nature of the rule so much as its arbitrary and unusual character which condemns it as unknown to the law of the land." Cooley's Const. Lim. (2d ed.), marg. p. 355. "The principles, then, upon which the process is based are to determine whether it is due process or not, and not any consideration of mere form." Cooley's Const. Lim. (2d ed.), marg. p. 356. "Administrative and remedial process may change from time to time, but only with due regard to the landmarks established for the protection of the citizens. When the government, through its established agencies, interferes with the title to one's property or with the independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those known principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely." Cooley's Const. Lim. 356. "Special courts cannot be created for the trial of the rights and obligations of particular parties. * * * The doubt might arise also whether a regulation made for one class of citizens, entirely arbitrary in its character and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained notwithstanding its generality." Cooley's Const. Lim. (2d ed.) 393. "While the right to a particular remedy is not a vested right, and while as a general rule every State has complete control over the remedies it affords to suitors in its courts, this, of course, must be understood with due regard to the organic law." *March v. The State*, 44 Texas, 81.

The calm judgment of mankind has kept these doctrines, to wit, a trial "by a jury of the vicinage," and by "due course of the law of the land," among its jewels. "In times of excitement they have been beaten down, but with the return of reason comes the public voice," and demands and reasserts them more firmly than before.

Argument for the appellant.

The court erred in the charge to the jury wherein it is said, "It shall only be necessary to prove that defendant took any one step or did any one act or thing in the commission of the offence, if from any such step, act, or thing any intention to defraud may reasonably be inferred." This charge was a literal copy of sect. 3 of the law of July 28, 1876. There are three requisites to the conviction of a citizen of this State for crime: *first*, the offence must be defined (Pasc. Dig., art. 1605); *second*, it must be charged in an indictment, in which the nine requisites thereof are stated (Pasc. Dig., art. 2863); *third*, the offence as charged must be proven by witnesses. In the case of *Hewett v. The State*, 25 Texas, 724, the statute under which defendant was indicted provided "that if any person or firm shall sell, or be in any wise concerned in selling, spirituous, vinous, or other intoxicating liquors in quantities less than one quart, without having first obtained a license therefor in the manner prescribed by this act, he, she, or they shall be deemed guilty of a misdemeanor; that in all prosecutions for any violations of any of the provisions of this act it shall be sufficient to allege and prove that the person charged with any such violation did sell, or was concerned in selling, spirituous, vinous, or intoxicating liquors; and it shall not be necessary to allege or prove that the same was sold without license."

Roberts, J., in delivering the opinion of the court, says: "We do not think that the Legislature can condemn a particular act as an indictable offence, and then empower the courts, in the prosecution of a party for the commission of that act thus condemned, to substitute in the indictment and proof of it a different act which is not the same, and is not itself prohibited by law."

The court quote our Bill of Rights, that "no citizen shall be deprived of life, liberty, etc., except by due course of the law of the land." *Hewett v. The State*, 25 Texas, 726; *The People v. Toynbee*, 2 Park. Cr. 329; *Wynhamer v. The People*, 2 Park. Cr. 421; *The People v. Toynbee*, 2 Park. Cr. 491; *The State v. Slater*, 6 Coldw. 252.

Argument for the appellant.

Sect. 3 of the act of July 28, 1876, was literally charged by the court. The Legislature in this section says that a man may be convicted of land-forging though his crime was not fully proven according to the rules of the "law of the land." If the Legislature has power to say that half proof, or any amount short of full proof, according to our rules of criminal procedure, shall convict the accused, then they may convict him without proof. Suppose the indicted person pulled off his coat, dipped his pen in the ink, and said to his accomplice, in the hearing of a witness, that he was going to write a forged transfer to A. B.'s head-right in Travis County, — is that forgery? And yet the accused took a step and did several acts and things in the commission of the offence from which might be inferred the fraudulent intentions referred to in the statute. Suppose the accused person went further, and commenced to write the forged transfer, — could that be forgery? Not so if a forgery is a "false instrument in writing purporting to be the act of another." Pasc. Dig., art. 2093. Now if we suppose (which is not improbable) that the Legislature intended that the State should first fully prove by competent evidence that the forgery charged had been committed, and then that the defendant might be convicted if it was shown that he took any one step or did any one act or thing in the commission of the offence if from such act or thing any of the fraudulent intentions referred to in the statute could be inferred, still the law is unconstitutional, for it authorizes the jury to convict without full proof. It authorizes them to infer that the accused perpetrated one or more of the constituent elements of the offence without that fact being proven. The mind with thought might imagine fifty different acts or things in the commission of forgery from one or more of which the intent to defraud might reasonably be inferred, but not so safely inferred as where all the facts constituting forgery are proven. This statute cuts off all reasonable doubt from the prisoner, and

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is calculated to put him on proof that he did not commit the offence.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The appellant was prosecuted in the District Court of Travis County under the act of July 28, 1876, entitled "An act to provide for the detection and conviction of all forgers of land-titles," on an indictment which contains two counts. Several exceptions to the indictment were made by the defendant's counsel, which were overruled by the court, and the defendant excepted. The judgment-entry recites that thereon "both parties announced themselves ready for trial; and the indictment in this cause containing two separate counts, the State now elected to try the defendant on the count of forgery."

The count in the indictment upon which the State elected to try and on which the trial was had charges "that D. H. Francis, in the county of Robertson, in the State of Texas, on the 20th day of April, in the year of our Lord eighteen hundred and seventy-seven, wilfully, feloniously, without lawful authority, and with the intent to defraud, did make and forge a certain false and forged instrument in writing, purporting to be the act of another person, to wit, the act of one William Smith, and which false and forged instrument in writing did then and there relate to and affect an interest in land in the State of Texas, and which said false and forged instrument in writing was by the said Francis then and there falsely made in such manner that said false and forged instrument in writing would, if the same were true and genuine, have affected and transferred certain property, to wit, a certain valid land-certificate or warrant numbered 55, issued to John Todd by Clement R. Johns, comptroller of public accounts of the State of Texas, for six hundred and forty acres of land in the State of Texas, and which false and forged instrument in writing

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purports to be a conveyance and transfer of the land-certificate or warrant aforesaid from the said William Smith to one R. W. Bell, and purports to bear date on the 20th day of April, A. D. 1877, and is in the words and figures following, to wit: " — and here follows the instrument on which the forgery is assigned. This count has the proper commencement and conclusion.

Of the several exceptions taken to the indictment, and which were overruled, the first three take the position, virtually, that the grand jury of Travis County had no lawful authority to indict the defendant, because the indictment shows on its face that the offence charged was committed in Robertson County and that the defendant was a citizen of that county at the time he is charged with committing the offence. The fourth ground of exception is that the petit jury of Travis County and the District Court of that county have no authority to try the case, even if the grand jury may indict. The fifth exception is as follows: "Because the statute under which this indictment is found, and particularly sect. 5 thereof, is unconditional and void." There is one other exception, which refers to the second count in the indictment; but as this count was abandoned by the prosecution, this exception need not be further noticed.

Besides these preliminary exceptions, two others were set out in a motion in arrest of judgment, the first of which asserts the proposition that sect. 5 of the act under which the prosecution was had is unconstitutional and void for the following reasons: 1. Because said section is not embraced in nor indicated by the *title* of the act; 2. Said sect. 5 is a special law; 3. Because it is contrary to the provisions of art. 1, sect. 19, of the Bill of Rights, and to sect. 10 of the same article. The second is: Because the testimony discloses that the defendant forged the instrument described in the indictment, if at all, in Waller County, and not in Robertson as charged in the indictment. The record

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does not disclose that the motion in arrest of judgment was ever acted on by the court. It is noticeable, however, that all the grounds of exception to the indictment, as well as those set out in the motion in arrest of judgment, are substantially set out in the defendant's motion for a new trial, except perhaps such as question the constitutionality of the act under which the defendant was prosecuted.

It is hardly necessary or requisite now that we should enter into an elaborate investigation into the question as to the constitutionality of the act of July 28, 1876, as this particular subject was before this court and necessary to a decision in the case of *Ham v. The State*, 4 Texas Ct. App. 645, when on full argument and mature consideration it was held that the law in question was constitutional, and that sect. 5 of the act is germane to the title of the act, and is not a special or local law. In the opinion in *Ham's Case* it was said by the present presiding judge of this court that "so outrageous had become the wrongs inflicted upon our citizens by means of forged land-titles, that the framers of our last Constitution incorporated into that instrument the sixth section of art. 13, which provides that 'the Legislature shall pass stringent laws for the detection and conviction of all forgers of land-titles, and make such appropriations of money for that purpose as may be necessary.' In obedience to this requirement the Fifteenth Legislature, the first which assembled under the new Constitution, on July 28, 1876, passed an act entitled 'An act to provide for the detection and conviction of all forgers of land-titles.' " Gen. Laws 1875, p. 59.

Sect. 5 of the act in question, to which we understand the objection in the present case applies, is in this language: "Persons out of the State may commit, and be liable to indictment and conviction for committing, any of the offences hereinafter enumerated which do not in their commission necessarily require a personal presence in this State, the object of this act being to reach and punish all

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persons offending against its provisions whether within or without the State; and indictments under this act may be presented by the grand jury of Travis County in this State, or in the county where the offence was committed, or in the county where the land lies about which the offences in this act were committed." It is to the latter portion of this section, which provides that "indictments under this act may be presented by the grand jury of Travis County," as we understand, the objections here presented apply; it being contended on behalf of the appellant that the grand jury of Travis County had no right to indict, nor did the District Court and the petit jury of that county have lawful authority to try the accused on the indictment presented, it appearing on the face of the indictment that the forgery set out was committed in Robertson County.

It is conceded that the questions here raised to the constitutionality of the section of the act under consideration are not precisely identical with those raised in *Ham's Case*; yet, inasmuch as the section has been held germane to the requirements of the Constitution, we must hold the particular portion complained of, which provides that indictments under this act may be presented by the grand jury of Travis County, necessarily carries with it the right of the District Court of Travis County, or of either of the two counties mentioned in the section, to try the person so indicted in that county, without reference to prior legislation on the subject of the venue of criminal trials. The question of variance is, under this act, wholly immaterial where it is averred or proved the offence was committed, if it affected land in Texas.

Counsel for the appellant have prepared the case for appeal with more than ordinary care; every ruling of the court complained of on the trial below is presented in the record by clear bills of exception, so as to leave no doubt or uncertainty as to the precise matter complained of. In the view we take of the case, it will not be necessary that

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the several matters set out in the bills of exception should be separately considered. We notice, as most important, some of the rulings of the court below on the evidence; and, secondly, the charge of the court.

1. The State introduced as a witness one J. Barry Strong, and after he had been sworn the defendant objected to his testimony "because he stands indicted in this court for the forgery of the conveyance from John Todd to William Smith, and because the State proposes to take the testimony of said witness without first dismissing the said indictment against the witness, it being admitted that he was indicted therefor." The objection was overruled, and the defendant excepted.

2. The State's counsel offered in evidence the conveyance to the John Todd certificate, from William Smith to R. W. Bell, which was objected to on several grounds, viz.: because the State had not shown that the defendant wrote or signed the signature "William Smith" to said conveyance; because it does not purport to have been signed by this defendant nor acknowledged by him; because the body of the instrument is in the handwriting of another, and not that of the defendant; because there is an attesting witness to the genuineness of the signature of William Smith, who has not been called by the State to prove that the signature is a forgery; and because the testimony of the defendant as to who made the acknowledgment had not been offered. These objections were overruled, and exceptions reserved; and the transfer was introduced and read to the jury over the objections.

3. The State, by attorney, offered in evidence the certificate of acknowledgment to the transfer from Smith to Bell, which was objected to by the defendant because the certificate of acknowledgment is no part of the instrument alleged to be forged; because the certificate of acknowledgment is collateral and irrelevant to the issue being tried; and because, to prove that the certificate of acknowledg-

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ment was a forgery, or that the defendant had personated another in making the certificate, does not prove that he forged the instrument to which the certificate is attached.

In another bill of exceptions it is recited that after J. Barry Strong had sworn that he and the defendant forged the conveyance to the Todd certificate purporting to be a conveyance from Todd to Smith, the prosecution offered in evidence the conveyance from John Todd to William Smith of the Todd certificate; to the admission of which the defendant objected on several grounds, viz. : because the signature of Todd is only proved to have been written by the defendant by Strong, an accomplice; and because the testimony was irrelevant to the issue; and because it was not competent for the State to show another and different forgery than the one charged in the indictment, for the purpose of showing *scienter* in this. The objection was overruled, and the evidence admitted. Other objections of similar character were taken to testimony introduced by the State.

It is true that the production of evidence is in general governed by certain fixed rules : *first*, that the evidence must correspond with the allegations, and be confined to the point in issue ; *second*, the testimony is sufficient if the *substance* only of the issue be proved, etc. 1 Greenl. on Ev., sect. 50. But these general rules do not apply in every case ; on the contrary, the authorities are abundant to the effect that there are many qualifications and exceptions to these general rules which are of as binding authority and which are based on as sound reason as the general rules themselves. One of these exceptions is that testimony is admissible if it *tends* to prove the issue ; or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it. Nor is it necessary that its relevancy should appear at the time when it is offered ; it being the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which counsel shows will be rendered material by other

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evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case. 1 Greenl. on Ev., sect. 51a.

Evidence going to show knowledge and intent of the party against whom it is offered, though apparently collateral and foreign to the main subject, may have a direct bearing, and thus become admissible. So, in an indictment for knowingly uttering a forged document or a counterfeit bank-note, proof of the possession or of the prior or subsequent utterance of other false documents or notes, though of a different description, is admitted as material to the question of guilty knowledge or intent. Cases of this sort, therefore (says Mr. Greenleaf), instead of being exceptions to the rule, fall strictly within it. 1 Greenl. on Ev., sect. 53 and notes.

Mr. Wharton (1 Whart. Cr. Law, sect. 649), on the authority of quite a number of cases, lays down the following rule: "When the *scienter* or *quo animo* is requisite to and constitutes a necessary and essential part of the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distinct crime." We are of opinion that under a proper application of these authorities (and they are not alone) the court did not err in any of its rulings in admitting the testimony set out in the record against the defendant. The testimony was, we are of opinion, properly admitted.

With reference to the charge of the court, the judge instructed the jury, among other things, as follows: "Our statute further provides that in case of forgery affecting the titles to lands in Texas, upon indictments in such cases it shall only be necessary to prove that the person charged took any one step or did any one act or thing in

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the commission of the offence, if from such step, act, or thing any intention to defraud may be reasonably inferred.” This charge was excepted to at the time of the trial, as shown by a bill of exceptions embodied in the transcript. We are of opinion that this charge of the court as set out above, whilst it is in the language of the statute, or nearly so, was defective in that it did not make any application of the law to the facts in evidence, or give to the jury any such direction as to enable them to determine what fact, or act, or step, or thing would be such as that the jury might reasonably infer the existence of an intention to defraud, or that they might not reasonably infer such intention to defraud from the proof of the defendant’s having taken any one step or done any one act or thing which had been admitted to prove *scienter*, without any direct reference to whether the testimony introduced was sufficient to establish the fact that such step, act, or thing related directly to the forgery for which the defendant was being tried. The particular charge which is copied above, as well as the charge taken as a whole, was defective and insufficient in not making an application of the law to the issue being tried, nor giving to the jury such instructions as would enable them to apply the facts to the law, with reference to the issue of guilty or not guilty of the offence charged in the first count in the indictment, to wit, the forgery of the transfer from Smith to Bell of the land-certificate described therein.

To our minds, the remarks of the chief justice of the Supreme Court in *Marshall v. The State*, 40 Texas, 200, which follow, are as applicable to the present case as they were to the one then under consideration, changing only the character of the offence: “The charge of the court excepted to is composed of definitions of murder, assaults with intent to murder, an aggravated assault, and a common assault, together with explanatory provisions relating thereto, extracted from the Penal Code. There is no effort, in giving the charge to the jury, to ‘distinctly set forth the

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law applicable to the case' as developed by the facts proven on the trial, which is required in every case of felony whether asked or not. [Citing the article.] When there is a failure to perform this duty, and an exception thereto is made at the time of the trial, and the exception is made to appear by a bill of exceptions, it is expressly made good cause for the reversal of the judgment of conviction." Citing Pasc. Dig., art. 3067.

We are of opinion that the charge of the court in the present case comes clearly within the rule in *Marshall's Case* as quoted above. With the exceptions that the charge instructs the jury as to the presumption of innocence and the reasonable doubt, and that the jury are the exclusive judges of the weight of the evidence and the credibility of the witnesses, and directs them to apply the law as found in the charge to the evidence before them, the whole charge is made up of extracts from the statute under which the defendant was being prosecuted.

Because of error in the charge of the court, the judgment will be reversed and the case remanded for a new trial.

Reversed and remanded.

J. REYNOLDS v. THE STATE.

1. PRACTICE IN THIS COURT. — Unless a bill of exceptions was reserved, the refusal of a continuance will not be revised.
2. CONTINUANCE. — Art. 560 of the Revised Code of Criminal Procedure subjects the truth, sufficiency, and merits of all applications for continuance to the discretion of the court below; but this in no wise relaxes the diligence required, nor dispenses with a bill of exceptions to a refusal of the continuance.
8. DILIGENCE — PRACTICE. — If an application for a continuance failed to show diligence, the defect cannot be supplied by the affidavit of the defendant, or that of his absent witness, in support of the motion for new trial.

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4. DILIGENCE is wanting when it appears that fifteen days before the trial a subpoena for the absent witness was returned not executed, and no other process for him was sued out.
5. NEW TRIAL. — Under the provision of the Revised Code of Criminal Procedure allowing the State to “take issue with the defendant upon the truth of the causes set forth in the motion for a new trial,” counter-affidavits may be filed in opposition to the motion.

APPEAL from the District Court of Goliad. Tried below before the Hon. H. C. PLEASANTS.

The conviction was for theft of a gelding.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. No bill of exceptions was reserved to the action of the court in overruling defendant's application for a continuance in this case, and consequently the question is not a subject for revision. *Nelson v. The State*, 1 Texas Ct. App. 41.

A new provision incorporated into our statute upon continuance is that “the truth of the first or any subsequent application, as well as the merit of the ground set forth therein, and its sufficiency, shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right; *provided*, that should an application for a continuance be overruled and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued for the term or postponed to a future day of the same term.” Code Cr. Proc., art. 560. But this provision is not intended to do away in the least with the diligence required in the second subdivision of the article, nor to permit in lieu thereof an

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affidavit of a witness to material facts in the motion for a new trial, to supply the want of diligence; nor the want of a bill of exceptions to the overruling of the application.

In this case defendant files in support of his motion for a new trial the affidavit of the witness Burriss to facts which might have been material had proper diligence been used to secure his attendance. Such, however, is not the case; for the subpoena issued for defendant's witnesses, which is made an exhibit to his application, shows that it was returned not executed as to this particular witness fifteen days before trial, and no other process was sued out to secure his attendance. Want of diligence cannot be supplied on the motion for new trial, either by the affidavit of the party himself, or, as was sought in this case, by the affidavit of his witness. *May v. The State*, 6 Texas Ct. App. 191. So far as the motion for a new trial was concerned in connection with the proposed testimony of the witness Burriss, the court did not err in overruling it.

On its other grounds the State took issue by filing counter-affidavits under another new provision of our statute, which prescribes that "the State may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial, and in such case the judge shall hear evidence by affidavit or otherwise, and determine the issue." Code Cr. Proc., art. 781. We are of opinion the court did not err in overruling the motion for a new trial.

The evidence is sufficient, and the charge of the court the law of the case. No error has been made to appear, and the judgment is affirmed.

Affirmed.

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ABE ROTHSCCHILD v. THE STATE.

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1. **MURDER — VARIANCE.** — Indictment for murder designated the deceased as “one certain white woman whose Christian and surname is to the grand jurors unknown, but whom the said grand jurors do name and call Bessie Rothschild, *alias* Bessie Moore, *alias* Diamond Bessie.” The defence introduced the foreman of the grand jury to prove that prior to the homicide he saw a woman who he was told “was a fast woman called Diamond Bessie,” and afterwards heard that she had been killed. *Held*, that this proof was properly excluded. It could not have sufficed to bring the case within the ruling in *Jorasco v. The State*, 6 Texas Ct. App. 288, that on the trial of such an indictment a fatal variance is apparent if the evidence shows that the name of the deceased was known to the grand jury.
2. **CHANGE OF VENUE.** — The original Code of Criminal Procedure prescribed the county whose court-house was nearest that of the county where the prosecution was commenced as the county to which on a change of the venue the cause should be transferred for trial, unless the defendant, in his application for the change, showed some valid objection thereto; and if such an objection was shown in the application, it became the duty of the court to inquire as to the other adjoining counties, permitting the defendant to show valid objections to any or all of them. Only one change of the venue was allowable on the application of the defendant, and the supporting affidavits to the application were required to be citizens of the county in which the prosecution was instituted.
3. **SAME.** — By the act of 1876 the district judge, in any case of felony, was empowered of his own motion to change the venue to any county in his own or an adjoining district, stating in his order the reasons therefor. The exercise of this power was not ordinarily revisable on appeal, nor a refusal to exercise it assignable as error.
4. **SAME — PRACTICE.** — Application for a change of venue, and the hearing thereof, are proceedings preliminary to the trial, and not part of the trial itself. The presence of the defendant, therefore, is not necessary when the application is heard or determined. The better practice is, however, to have the defendant present whenever any proceeding, however trivial, is had in his case.
5. **GRAND JURY — SECRECY OF DELIBERATION.** — The Code stringently guards the grand jury from intrusion and undue influence, and to this end prohibits the presence of even the prosecuting attorney “when they are discussing the propriety of finding a bill of indictment, or voting upon the same;” and it expressly provides that the presence of any unauthorized person “when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same,” is one of the two causes for which an indictment or information shall be set aside.
6. **SAME — PRACTICE.** — A motion to set aside an indictment for this cause is a written suggestion to the court, alleging the truth of the matter in sub-

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stance. It need not be technical in form, nor be verified by oath; nor need its verity be established by the record, but may be shown by proof *dehors* the record. To overrule a motion of this character, when made in time, without affording the defendant an opportunity to establish his allegation by proof, is error.

7. **PETIT JUROR — BIAS.** — In testing a juror for bias, the inquiry relates exclusively to the present condition of his mind; and the modes whereby he formed a conclusion are material only as indications of the strength or weakness of his conclusion. The Code expressly recognizes hearsay as a basis on which a disqualifying conclusion may be formed; and, on the other hand, a mere impression, though derived from the evidence, does not disqualify a juror unless it would influence his finding. In determining whether the juror's opinion would influence his finding, the tenor of the whole investigation is to be considered, and not merely the juror's statement that it would not so influence him. See the opinion *in extenso* on this subject.
8. **SAME.** — A juror in a capital case, who before he heard the evidence had formed the opinion that the accused was guilty, and retained it on his *voir dire*, avowing his purpose to act upon it unless he heard something that would change it, was not an impartial juror, and was subject to challenge for bias. And when the accused had already exhausted his peremptory challenges it was error to overrule his challenge for such cause and to empanel the juror. Had the accused been able to dispose of the juror by peremptory challenge, the overruling of his challenge for cause would have presented a different question on appeal. Note in the opinion the statements of the juror on his *voir dire*, and the review of authorities on these questions.

APPEAL from the District Court of Harrison. Tried below before the Hon. A. J. BOOTY.

The indictment charged that the appellant, on January 21, 1877, in the county of Marion, did with a pistol and of express malice aforethought kill and murder a "certain white woman whose Christian and surname is to the grand jurors aforesaid unknown, but whom the grand jurors aforesaid do name and call Bessie Rothschild, *alias* Bessie Moore, *alias* Diamond Bessie." The venue was changed from Marion to Harrison County, where, in December, 1878, a trial was had, which consumed the better part of the month and resulted in a verdict of guilty of murder in the first degree, and judgment of death.

The record contains more than eight hundred pages, com-

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prising the testimony of a multitude of witnesses, and nearly forty bills of exception. The opinion of this court sufficiently indicates those matters of fact which are pertinent to the rulings; and as there is no occasion to attempt a detail of the testimony, it suffices to refer to the report of the hearing on *habeas corpus*, in 2 Texas Ct. App. 560, where a condensed statement of the material evidence then adduced will be found. With the exception of Jennie Simpson for the prosecution and Belle Gouldy for the defence, the principal witnesses who then testified were examined at the trial from which this appeal was taken. Many others, however, were introduced, but their evidence imparts no new feature to the case.

A very forcible and learned brief and argument was filed in this court by the counsel for the appellant; but its length necessarily precludes its insertion.

Culberson, Armistead, Mabry, McKay & Culberson, Turner & Lipscomb, and Crawford & Crawford, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

1. This transcript presents at the threshold appellant's motion to set aside the indictment, which motion was overruled and a bill of exceptions saved. It was made under art. 523, Revised Code of Criminal Procedure, and it is presumed was intended to comply with said article. It could only be sustained where and when the record shows a fact necessary to set aside the indictment. The words "that it appears by the records" are intended to go to each cause assigned in art. 523 for setting aside an indictment. See *Coats v. The People*, 22 N. Y. 245; *The State v. Oxford*, 30 Texas, 428.

Again: if the words above copied in quotation marks do not go to and include the entire article, then the motion to set aside was properly overruled; because its object was to

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introduce proof *dehors* the record, for the purpose of falsifying or contradicting the record, which cannot be done. *Vestal v. The State*, 3 Texas Ct. App. 648.

If the matter set up in the motion was not apparent of record, then the motion should have been sworn to. Code Cr. Proc., art. 525. But it may be said that this motion is not included in the special pleas referred to by art. 525. If this be true, then the motion was and is nothing less than a plea in abatement, and must be sworn to unless the matters complained of appear of record. Code Cr. Proc., art. 27; Whart. Crim. Law, sect. 536. If the plea had been sworn to, and was regular in other respects as to matters of record, then it was and is bad for duplicity in that it sets up two distinct and separate grounds in abatement. *The State v. Hesselton*, 67 Me. 598; *Finley v. The People*, 1 Mich. 234; *The State v. Ward*, 63 Me. 225.

It may be said that under the statute one or more causes may be embraced in one plea. This may apparently seem so, but such is not the practice; as two or more pleas in abatement can be made to the same indictment, each plea embracing but one distinct cause. *The Commonwealth v. Long*, 2 Va. Cas. 318.

Again: the record neither shows that less than nine members of the grand jury found the indictment, nor that a person not authorized by law was present with the grand jury while they were deliberating on the bill; and it would not have benefited the defendant if the plea had not been overruled.

Again: this being a plea in abatement, it must have been filed prior to any other motion or plea (Code Cr. Proc., art. 522), which was not done in this case, and for that reason it was correctly overruled.

Again: in regard to the refusal of the court to permit the defendant to amend this plea, it is not shown in what manner and which part of the plea was desired to be amended; and if the plea was entitled to be regarded as a

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sworn plea, then the refusal to permit defendant to amend was right. *Sydnor v. Chambers*, Dallam, 601.

2. Defendant's motion to disclose names of private prosecutors was properly overruled.

A private prosecutor is one who prefers an accusation against a party whom he suspects to be guilty of some offence. No other is in law termed a private prosecutor except one who voluntarily has the charge preferred; and such is not pretended to be the case here. See "Prosecutors," 2 Bouv. L. Dic., and the authorities there cited.

3. Defendant's fifth application for a continuance was properly overruled. It neither shows diligence, materiality of testimony, nor probability of ever getting either. As to the witness Belle Gouldy, her residence or whereabouts was unknown; and if her testimony was material, it is apparent from the application for continuance that a sufficient predicate could have been laid to have used her testimony taken on *habeas corpus*. *Sullivan v. The State*, 6 Texas Ct. App. 319.

The witnesses Maria McCleaver and Katie Williams seem to have been attached, but the date of attaching does not appear, and no bonds were taken for their attendance on court.

The other witnesses appear to have been wanted only to establish immaterial matters. The court committed no error in refusing the motion, even if it were a second application as claimed by appellant. *Townsend v. The State*, 41 Texas, 134; *Cantu v. The State*, 1 Texas Ct. App. 402; *Richardson v. The State*, 2 Texas Ct. App. 322; *Coward v. The State*, 6 Texas Ct. App. 59; *Handline v. The State*, 6 Texas Ct. App. 347; *Sealy v. The State*, 1 Kelly, 213; *Robles v. The State*, 5 Texas Ct. App. 346.

4. The court did not err in refusing to allow the defendant to challenge the jurors Saunders, Sherod, and others for cause. The jurors show by their statements that the ideas or opinions they had of the case were not founded on hear-

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ing any of the evidence, but simply on rumors and newspaper reports. An opinion predicated on these will not disqualify persons from serving as jurors. *Grissom v. The State*, 4 Texas Ct. App. 374; *Epps's Case*, 5 Gratt. 676; *The People v. Brotherton*, 47 Cal. 388; *The People v. Vasques*, 49 Cal. 560; *Sharp v. The State*, 6 Texas Ct. App. 650; *Reynolds v. United States*, 8 Otto, 145.

5. Defendant took a bill of exceptions to the ruling of the court in refusing to permit the witness Ellis to answer questions concerning the reputation of deceased around Jefferson in regard to her name as known in the community. While this proof would have been proper and legal in ordinary cases, yet in this case the whole evidence shows that deceased was a stranger, in fact a transient traveller, stopping at the hotel only a few days at most before she was killed. As she did not live in the neighborhood, she had no reputation known to any one there; and her reputation in a strange land amounted to nothing and would not be made a subject of inquiry there. Especially was this true when no sufficient predicate had been laid as to the acquaintance of the witness with the reputation of deceased's name.

The same rule should prevail in this as in the manner of destroying the credit of a witness by proof of his bad reputation for truth amongst his neighbors. The proof of the reputation of a person for any purpose, or the proof of the reputation of the name by which a person is known, must of necessity rest on and be determined by the same rule of evidence. Apply the rule laid down in regard to proof of reputation for truth, in this case, and the evidence was clearly inadmissible. 1 Greenl. on Ev., sect. 461; *Boon v. Wethered*, 23 Texas, 675.

6. The indictment was found in Marion County. In the spring of 1878 defendant made a motion for change of venue. The motion was granted, and the case sent to Harrison County, because the court-house of the latter county

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was nearest to the court-house of the former. Code Cr. Proc., art. 581. When this order was made, there was nothing before the court to show that any prejudice existed against defendant in Harrison County except the joint affidavit of two persons. The defendant did not make or pretend to make any showing in his application for change of venue that he had any objection to his case going to Harrison County. His own affidavit should have been first made as a basis on which to prove by others the existence of prejudice in Harrison County; and until he did make such an affidavit he could not show its existence by others. Code Cr. Proc., arts. 578, 581, 582.

In so far as the action of the court is complained of in making the change of venue, that is a question to be determined by the court in the exercise of a sound discretion; and unless it is manifest that a wrong was committed towards the defendant, this action should not be reviewed. *Brown v. The State*, 6 Texas Ct. App. 286; *McCarty v. The State*, 4 Texas Ct. App. 461; Code Cr. Proc., art. 581.

7. After the case was transferred to Harrison County, defendant pleaded to the jurisdiction of the court to try his cause, which could not be done after defendant had entered his plea of not guilty. The plea to the jurisdiction was overruled, and a bill of exceptions saved. At the time this plea was made, the law recognized such a plea in criminal cases. Pasc. Dig., arts. 2951, 2953. Compare this last article with art. 525, Code Criminal Procedure, and it appears that there is no such plea known to the law now. The plea being abolished by statute, it makes no difference now whether the court acted right or wrong in overruling the plea to the jurisdiction, because the defendant cannot avail himself of that plea if the cause were reversed. He would be, in the court of Harrison County, powerless to remove his cause, as it does not seem the law contemplates but one change of venue to defendant. Rev. Stats. 718, sect. 5; Code Cr. Proc., art. 581. But the action of the court is

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not asked to be sustained solely on the change in the law. That Harrison County was the place to send the case to, see Code Cr. Proc., art. 581.

The bill of exceptions does not show that defendant was not in court when the order changing the venue was made. The order was the result of his own motion, and in accordance with his request, and he has nothing to complain of whether he was there or not; and it was too late to raise the question of defendant's absence for the first time in Harrison County. *Garcia v. The State*, 5 Texas Ct. App. 237. Again: the action of the District Court of Marion County could not be attacked in this way for the first time by a plea to the jurisdiction of the District Court of Harrison County. *Harrison v. The State*, 3 Texas Ct. App. 558.

8. As to the allegation in indictment of the unknown person killed called by the name of Diamond Bessie, etc., it is apparent from the evidence that her name was not only unknown to the grand jury, but to the whole community, as a fact; and the rule laid down by this court will not apply in the case at bar. *Jorasco v. The State*, 6 Texas Ct. App. 243.

9. The bill of exceptions in regard to the bringing of the trunk in court does not show that any error was committed. *Handline v. The State*, 6 Texas Ct. App. 347; *Walker v. The State*, ante, p. 245.

10. The motion for change of venue made in the District Court of Harrison County was properly denied. It is to be remembered that the change of venue from Marion to Harrison County was made on the motion of defendant. Before defendant could change the venue, the law required him to enter a plea of not guilty. Code Cr. Proc., art. 580. This was intended for a wise purpose; and it is submitted to the court as a proposition of law (heretofore undetermined so far as ascertained), that when defendant changed the venue, on complying with the stern requisite

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of the law by the plea of "*not guilty*," he accepted the change of venue under all the restrictions of practice and pleading after having pleaded to the indictment.

The law recognizes but one plea for the defendant after having pleaded to the indictment (besides a few special pleas which are permitted to be made as assistants to the plea of not guilty), and that sole plea is an application for *a continuance after the trial has begun, when some unexpected occurrence may happen*. See Code Cr. Proc., art. 568. This article, and art. 25, Code Criminal Procedure, settle beyond question that the trial as understood and fixed by the law of Texas is from the time of the entry of the plea of not guilty to the return of the verdict by the jury, and perhaps the judgment pronounced thereon. Thus having ascertained and determined by statute *when the trial begins and ends*, no decisions of courts outside of Texas can control or interfere with the rule prescribed. See arts. 1 and 27, Code Cr. Proc. Art. 522, Code Criminal Procedure, says the plea of not guilty is the last plea; and when that is made, issue is joined, and all other pleas except the one provided in art. 568, Code Criminal Procedure, are excluded from the defendant. Now apply the rule of law made by statute to the case at bar, and all pleas made by defendant (after the plea of not guilty was entered in the District Court of Marion County on the change of venue being granted) were made (including his application for continuance, for it does not comply with art. 568, Code Criminal Procedure) without authority of law, and were properly and rightly overruled.

Again: it is to be noticed in connection with change of venue, that when the change is made otherwise than on the application of defendant the law does not require defendant to enter the plea of "*not guilty*" (see Acts 1876, p. 274; Code Cr. Proc., arts. 576, 577); thus holding open to defendant the right to make and enter any and all pleas he would have been entitled to had the venue not been

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changed. But, on the other hand, when the venue is changed on the defendant's motion (as was done in the case at bar), the law compels him to enter the plea of not guilty. Then the trial in fact begins; he cannot then be heard to complain of any matters which are the result of his motion.

To permit a defendant to change the venue and begin his trial by pleading not guilty, only, because he cannot obtain an impartial jury at the venue where the plea is entered, to plead *de novo* would be to enable him to use the humane right accorded him (to try in another county) to complicate the effort to enforce remedial justice, and to avail himself of a privilege which he would not have been entitled to after plea of "not guilty" had the venue not been changed. Code Cr. Proc., arts. 522, 568, 580. That the foregoing tenth paragraph contains the true definition of the beginning and ending of the actual trial, and of the plea a defendant is entitled to after a trial begins, there can be no question. But suppose, as stated by counsel for appellant, that the trial of a criminal cause begins with the "inception of the indictment, and concludes with the disposition of the cause on appeal (if it is appealed), and that a defendant has to be present at every stage of the trial," then it is submitted as a clear conclusion of law, applying the rule laid down in art. 568, Code Criminal Procedure, to appellant's definition of the beginning and ending of a trial, that the only plea a defendant is entitled to after the indictment is found is the application for a continuance, for unexpected happenings, etc. This broad definition of the beginning and ending of the trial would sweep from a defendant every plea except the application for a continuance; which was never contemplated by law. Again: this court, according to appellant's view of the personal presence of defendant at every stage of the trial, could not pass upon the case at bar without defendant's presence.

This view is presented to show the fallacy of appellant's

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legal position. If the court shall conclude that the trial begins as stated by counsel for appellant, then it is submitted that all of his pleas were properly overruled, and he has nothing to complain of. But if the court shall conclude that the trial begins when the plea of "not guilty" is entered and issue is joined on the change of venue being granted, then it is insisted that every plea of defendant made in the District Court of Harrison County was properly overruled, and the action of the District Court of Harrison County should be sustained.

CLARK, J. An elaborate review of the authorities as to the question of variance between the allegation and proof as respects the name of the deceased is not deemed essential to a proper determination of that question. In the well-considered case of *Jorasco v. The State*, many of these authorities are collated, and the principle deduced that where the name of a third person is necessary to be stated in an indictment, and upon the trial it is apparent that such name was known, and could have been ascertained by the grand jury without any difficulty, the action of the grand jury in alleging that the name of the person was unknown cannot be overlooked as immaterial, but the variance will be fatal to the conviction. 6 Texas Ct. App. 238.

For the purposes of this case it will suffice to say it is apparent from the record that the name of the murdered woman was not known to the grand jury who presented the bill, nor could it have been ascertained by the exercise of any reasonable diligence. Apart from the fact that she was a transient stranger in the country, having only arrived a few days before the murder, and seems to have been known to no one except by mere rumor, by which she was styled with various *aliases*, she evidently belonged to an unfortunate class whose names are as fleeting as the shadows upon the wall, and who exchange one name for another with the same facility that they traverse the country from town to

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town. Under these circumstances, no principle of criminal pleading demanded that her name be stated in the indictment with fixed certainty, because that name could not have been ascertained with certainty, and the grand jury could well style her, as they did, an unknown white woman whose Christian and surname was to them unknown.

And with equal propriety could they, in addition, endow her with the various appellations rumor had assigned to her in life and after death. Such latitude of pleading is based upon necessity, and so long as that exists the rule applies. Says Bishop: "Necessity is a master before whom all things bow. No one is blamable for yielding to the inevitable; therefore nothing which is compelled by necessity is in law a crime. The rule of reason which exculpates offenders when what was done was compelled by necessity, excuses the pleader when alleging against a wrong-doer the particulars of a criminal charge. He is not required to be more specific than the circumstances will permit." 1 Bishop's Cr. Proc., sects. 319, 493, 495. The court did not err in sustaining objections to the testimony of the witness Ellis, the foreman of the grand jury, as to his knowledge of the woman's name; and his answers, if elicited, could have no effect upon the result of the trial, either in the court below or in this court.

Upon an application by a defendant for a change of venue upon either of the grounds specified in the statute, if he desires that the case shall be transferred to some county other than that whose county-seat is nearest the county-seat of the county in which the prosecution is instituted his application must embody some valid objection to such nearest county, else he cannot complain if the court in the exercise of its discretion follows the law and sends the case to that county which the law designates. Such is the express import of the statute, and such the decision of this court. Pasc. Dig., art. 2998; *Harrison v. The State*, 3 Texas Ct. App. 558.

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The proper construction of the original statutes in the Code, relating to the county to which the case should be transferred, seems to be this: The change must be made to the nearest county if no valid objection to that county be shown. Such valid objection can only be shown by the defendant after proper allegation in his application, supported by proof. If upon such allegation and proof the court is satisfied that the nearest county is subject to some objection, then it is his duty to inquire as to the other adjoining counties; upon which inquiry the law seems to dispense with formalities, and permits a defendant to show to the court in any proper and legal manner the existence of some valid objection to all the counties adjoining that in which the prosecution is pending. The opposite construction, contended for by counsel, to wit, that objections to the nearest county may be shown upon the hearing whether set out in the application or not, would nullify a plain and positive provision of the first statute (art. 2998), which is always to be avoided in statutory construction, while the construction here given preserves both statutes in their entirety and gives full effect to a plainly deducible legislative intent. Pasc. Dig., arts. 2998, 2999.

Under the act of 1876 (Laws 1876, chap. 156) it was competent for the court below, of its own motion and without any showing by the defendant, in the application or otherwise, to have ordered a change of venue to any county; and such is the effect of the decision in *Preston's Case*, 4 Texas Ct. App. 186. Had the court in the case at bar seen proper, from the evidence furnished him or from his own knowledge, to have transferred the case to some county other than that whose court-house was nearest, its action would not be reviewed by this court, at least in the absence of a manifest showing that by such action the rights of the defendant were materially prejudiced. And it is equally palpable that the refusal to exercise this discretion cannot be made the subject of valid complaint here

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on the part of this defendant. If a valid objection to Harrison County really existed, the law afforded him a plain and adequate remedy, which he failed to invoke in the mode pointed out; and he cannot be heard to complain because the court refused to aid him with its discretion, and refused to consider testimony in the absence of a compliance by himself with the only law which authorized its consideration.

While a change of venue is authorized by the Constitution, yet it is subject to such regulations as the Legislature may prescribe; and regulations which are reasonable and which do not tend to entirely defeat the right are as obligatory upon courts as the provision of the Constitution itself. The right is exceptional in its nature, and those who would avail themselves of it must bring themselves clearly within the regulations; and the application is to be construed most strongly against the defendant, upon the familiar principle that it is to be supposed he states the facts most strongly in his favor.

Upon a removal of the cause to Harrison County the defendant filed pleas to the jurisdiction of the District Court of that county, based substantially upon the fact that at the time the order for a change of venue was formally entered in the District Court of Marion County the defendant was not present in court but was then in confinement in the county jail. From the bill of exceptions it appears that the application for a change of venue was heard and considered on the eleventh day of May, and the court then and there awarded the change of venue, but reserved its decision as to what county the case should be sent. There seems to have been some sort of agreement, presumably oral, between counsel for the State and for the defendant that the case should be sent to the county of Cass; but on the fifteenth day of May counsel for the State withdrew their assent to such agreement, and the court thereupon entered an order transferring the case to Harrison County, which was the nearest county.

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When these proceedings were had the defendant was not present, but was represented by counsel, who saved a bill of exceptions to the order; but not on the ground that the defendant was not present. The defendant was present during the hearing of the application. It is now contended that these proceedings had on the 15th of May constituted a part of the "trial" of the cause, and that under the Constitution and the laws the defendant was not only entitled to be present, but that his presence was absolutely indispensable to the jurisdiction of the court. And we are referred to a number of authorities which announce the principle embodied in our statute, that "in all prosecutions for felonies the defendant must be personally present on the trial." Pasc. Dig., art. 3008.

We do not regard the proceedings on an application for a change of venue as any part of the trial, and in support of this position need not invoke any other authority than our own Code of Criminal Procedure, the wisdom and comprehensive character of which stands a fitting monument of the greatness of its original author. By reference to chap. 4 of Title IV. we find its style to be "Of proceedings preliminary to trial;" and when we examine the various provisions of that chapter we find that they relate to enforcing the attendance of the defendant and of witnesses, the service of a copy of the indictment, the arraignment of the defendant, the pleadings of the parties, their argument and decision, continuances, change of venue, and dismissals. Pasc. Dig., arts. 2874, 3006. It may well be assumed, therefore, that applications for change of venue, and the hearing thereof, constitute one of the proceedings preliminary to the trial, and not a part of the trial itself; and that the trial designated in art. 3008, above quoted, means a trial upon the merits, and not any or all of the various stages by which a case is prepared for final hearing and determination.

The provisions regulating trials are found in a subsequent title, which opens with an article prescribing the only mode

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of trial upon issues of fact in the District Court. Pasc. Dig., art. 3007. By an application for a change of venue the object and purpose of the defendant is to avoid a trial, and to cause the case to be transferred to another county where a trial may be had. He is required to state, and such is the statement of the defendant in this case, that for certain reasons he cannot obtain a fair and impartial trial in the county where the prosecution is commenced; and it would be manifestly against common sense to hold that his attempt to avoid a trial in the county was in law a part and parcel of his actual trial, even though the attempt was successful, as in this case. As said by the court in Missouri in a late case, "The application for a change of venue was made and granted previous to the trial. It was a favor to him, constituted no step in the progress of the trial, and it was not necessary that he should be personally present." *The State v. Elkins*, 63 Mo. 159.

It would have been proper in the court in this instance to have caused the prisoner to be brought into court before making its final order, and doubtless it would have been done had the counsel of the defendant, who was present, suggested it; and the better practice is to have the defendant present in all proceedings before trial, no matter how trivial or unimportant such proceedings may seem to be. While his presence may not be indispensable under the law, it may often be of advantage to a defendant to be in a position to readily consult his counsel, and to assist them with his suggestions in any emergency that may arise.

There was no error in overruling defendant's pleas to the jurisdiction of the District Court of Harrison County, for the reasons above indicated and for the additional reason that error in changing the venue cannot be availed of by such plea in the new tribunal. *Brown v. The State*, 6 Texas Ct. App. 286; *Harrison v. The State*, 3 Texas Ct. App. 558; *Wheeler v. The State*, 42 Ga. 306.

Nor did the court err in refusing to change the venue

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from Harrison County upon application of the defendant. The evidence adduced upon the hearing of this application showed that the supporting affiants were obscure persons, who from their associations and avocations were not likely to be at all familiar with the state of public sentiment in the county, and their answers on the witness-stand manifested such recklessness that the court was well authorized to believe that their affidavit was induced by something else than actual knowledge and a conscientious disposition to preserve the purity of jury-trials. When this is apparent, it is immaterial how many witnesses may testify to the existence of the prejudice, or how many to its non-existence.

Winkfield v. The State, 41 Texas, 148; *Walker v. The State*, 42 Texas, 360; *Buie v. The State*, 1 Texas Ct. App. 452; *Dupree v. The State*, 2 Texas Ct. App. 613; *Dixon v. The State*, 2 Texas Ct. App. 530; *Houillion v. The State*, 3 Texas Ct. App. 537; *Johnson v. The State*, 4 Texas Ct. App. 268; *McCarty v. The State*, 4 Texas Ct. App. 461; *Labbaite v. The State*, 6 Texas Ct. App. 257.

But a more serious objection to granting this application for a change of venue presents itself in our statutes regulating this procedure. These provide that a change may be granted on the written application of the defendant, "supported by his own affidavit and the affidavit of at least two credible persons *residents of the county where the prosecution is instituted*," for certain causes, the first of which is "that there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial." Pasc. Dig., art. 2994. Evidently the law contemplates that a defendant shall be entitled to but one change under this statute, for it makes no provision for a second. The application must be supported by the affidavit of persons resident in the county where the prosecution is instituted, and the prejudice must exist in the county where the prosecution is commenced,

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and not in the county where it may be pending after change of venue. To hold otherwise would require upon the part of courts the substitution of the word "pending" for the terms "instituted" and "commenced," in the statute, which would be tantamount to judicial legislation. Courts must assume that the law-making powers understand the import and effect of the language they employ, and cannot construe that which from its simplicity needs no construction.

If a second application is authorized, after the venue has once been changed, it must be supported by the affidavits of credible persons resident in the original county, which might be distant many miles from the county where the prosecution is pending, and with the public sentiment of which the affiants could not in reason have any acquaintance. In a recent case in Indiana this question arose upon a second application for a change of venue on account of the prejudice of the presiding judge, one application having already been granted on that ground; and in deciding adversely to the application the court employ this language: "The affidavit, we think, fulfils the requisites of the statute; but the question arises, Is the appellant entitled to two changes of venue in the same case, for the same cause? We think not. The statute nowhere authorizes a second change of venue to the same party for the same cause. The court had no more power to grant a second change than it would have to grant a third, fourth, or fifth, or any number of changes. The ends of justice demand this construction of the statute; otherwise it would be in the power of a defendant charged with a criminal offence to defeat a trial entirely." *Line v. The State*, 51 Ind. 172.

In this case the application did not conform to the statute in that it was not supported by the affidavit of credible persons resident in the county where the prosecution was instituted. And while, in the exercise of an

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enlarged discretion vested in him by sect. I of the act of August 21, 1876 (Laws 1876, p. 274), the district judge may of his own motion award a second change of venue, and might have done so in this case upon the appeal and prayer of the defendant, yet the provisions of this statute cannot be invoked to cure the supposed defects in other statutes upon which the application of the defendant was based, and by which alone its sufficiency must be tested. This provision in the statute of 1876 was enacted in the interests of public policy and public justice; and if a power of review is lodged with this court in case of its exercise, or failure to exercise it, this case does not call for such review.

The secrecy of the grand-jury room, and the purity and impartiality of that inquest, have ever been matters of watchful solicitude on the part of the law. Upon it depends in a great measure the safety and stability of society, and under the law no undue influence is permitted to sway its counsels or to influence its actions. While at common law it may not have been unusual to permit even the prosecuting attorney to be present during the time it was deliberating upon or finding a bill (Chitty on Bills, 317; 1 Bishop's Cr. Proc., sect. 862, note), yet under our Code this is strictly prohibited. In prescribing the duties, privileges, and powers of that body, almost the first mandate of the law is that "the deliberations of the grand jury shall be secret." Pasc. Dig., art. 2840. It further prescribes that "the district attorney may go before the grand jury at any time, except when they are discussing the propriety of finding a bill of indictment or voting upon the same." Pasc. Dig., art. 2841. And in further manifestation of the purpose of the law-making power, demonstrating that its command was something more than an idle direction or regulation, it is prescribed as one of the grounds for setting aside an indictment and holding it for naught, "that some person, not authorized by law, was present when the grand jury

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were deliberating upon the accusation against the defendant or were voting upon the same." Pasc. Dig., art. 2950.

It is needless to inquire why this particularity. Suffice it to say, it is the law, and manifestly enacted for wise purposes. By its due observance every person when arraigned before our courts upon presentment will have reason to feel and believe that he has not been presented through envy, hatred, or malice, nor that improper influences have penetrated that body which the law preserves as sacred, and wrung from it an accusation which otherwise would never have encumbered a docket.

Within the time prescribed by law the defendant, among other pleadings, filed his motion to set aside the indictment, one of the grounds of which was that one Edward Guthridge, a person not authorized by law, was present when the grand jury were deliberating upon the accusation and while they were voting upon the bill; and he then and there offered to prove in open court and before the court that said averment was true; but upon objection by counsel for the State the court refused to hear testimony, on the ground that the motion was insufficient in law; whereupon the defendant's counsel asked leave to amend the motion, which was refused, and the court thereupon overruled the motion. This, in brief, is the history of the proceeding as it appears in a bill of exceptions taken and filed at the time.

The particular objection by the State is not shown, nor does the record enlighten us as to why the motion was insufficient in law. On the face of the pleading it appears good on general demurrer at least. No strictness or technicality of pleading is essential in such cases, the motion being merely a suggestion to the court in writing, embodying substantially one or both of the grounds prescribed in the statute. The law does not require that it be sworn to; nor is it necessary to allege that it appears from the records of the court that some one not authorized by law was

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present when the grand jury were deliberating upon the accusation or voting upon the same, for such a fact, if it exists, never appears of record, and cannot be made to appear. Unlike the first ground contained in the statute, it can only be made to appear by proof *dehors* the record. While not a perfect pleading, it presented matter sufficient to require the court to hear the proffered evidence if in fact it existed, and to set aside the indictment promptly if the truth of the averment was established. Now as a matter of judicial knowledge this court may know that one Edward Guthridge was the county attorney of Marion County at the time this indictment was preferred, and the record also informs us of that fact; but even if the party referred to was this officer, his presence with the grand jury at the times alleged would vitiate the indictment, as well as that of any other unauthorized person. The State should have taken issue as to the facts set up in the motion, and had the issue speedily determined by the judge. Pasc. Dig., art. 2971. It may be there was no truth in the allegation. If so, that was the time and place to determine it.

The law gave to the prisoner the right, upon a proper allegation, to have the matter inquired into, and this right he was deprived of by the action of the court. The State was demanding his life, and in such a case no right, however unimportant, is to be denied him. In the language of Judge Wheeler, "When the State demands the extreme rigor of the law, the *summum jus*, it must be in subordination to every legal form and requisite. All the prescribed forms of law, however apparently unimportant in themselves, must be observed. The right to exact the ultimate penalty must appear clear and perfect, in every particular, in form and in fact." *Burrell v. The State*, 16 Texas, 149.

To a similar effect is the language of the court in *Calvin v. The State*: "The law of the case as it is developed to us by the record is precisely the same as if the accused

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were a free white man, and we cannot strain the law even 'in the estimation of a hair' because the defendant is a slave, or because of any unusual features which the case presents. In all civilized countries the law has always shown the most tender regard for human life, and judicial tribunals, in the administration of the criminal law, have always deemed it proper to adhere with great strictness to established rules wherever life or liberty is concerned. If courts could feel themselves at liberty to depart from principles and established rules in order to hasten the punishment of even great offenders, such departures might even result in the destruction of those safeguards which, in accordance with the genius of free governments, have been provided for the lives and the liberty of men." 25 Texas, 796.

Courts cannot be too careful, especially in trials of the graver felonies, in awarding to defendants the full measure of their rights under the law, and in restricting the prosecution within the limitations enjoined by law. The State in her wisdom and humanity has placed guarded restrictions around the trials of her citizens, and has guaranteed to them the enjoyment of certain rights and privileges, even though they stand under grave accusations for a violation of her laws. And when she comes into her own courts, in the person of her law-officer, and demands the forfeiture of the life or the liberty of the citizen, she is entitled to no more favor or consideration than the humblest citizen in the land. Such is her own law, and she would not change it if she could:

Another error assigned relates to the empanelling of the jury and the disqualification of certain jurors, some of whom were challenged peremptorily by the defendant after challenges for cause had been overruled, and one of whom sat in judgment upon him, his challenges being exhausted. This juror, William Sanders, on his *voir dire* appeared to be qualified, and was accepted by the State. Upon examination by the defendant, he stated that he had heard the case

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talked about a good deal ; had formed an opinion as to the guilt or innocence of the defendant from what he had heard, and that opinion was that he was guilty. He had not only formed the opinion, but had expressed it frequently, having heard the case talked about a good deal. This opinion was formed the first time he had heard the circumstances, and had continued until the present time, and was now his opinion. It was based upon what he had heard from outsiders, and he had never heard any particulars, or read any evidence in the case ; but he believed what he heard to be true, and still believed it. He would not take this opinion in the jury-box if selected as a juror, but would throw it aside and go by the evidence, as he could lay aside his opinions at will. The defendant then challenged for cause ; and thereupon, over his objection, the State reëxamined the juror, who in response to such examination stated that he did not have a well-established opinion in his mind now, as to the guilt of the defendant, which would influence his verdict ; and in response to further inquiry by the court, the juror stated that he had never heard the evidence or talked with the witnesses, but had heard about the case a good many times, first from one man and then from another, and could go into the jury-box and be entirely uninfluenced by any opinion he then entertained. The court thereupon overruled the defendant's challenge for cause ; and then with leave of the court the defendant further examined the juror as follows : —

“Q. Would we have to introduce evidence to change your opinion, or would you still entertain that opinion and act on it?

“A. If the evidence comes in same as I have heard, of course I would believe it.

“Q. What I want to know is this : you say you have an opinion, — would you change that opinion if we were to introduce some testimony to show the man was not guilty?

“A. Yes, sir ; I suppose so.

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“Q. If we did not do that, your opinion is formed conclusively?

“A. If the evidence is the same as I have heard it.

“Q. Then you have made that opinion an established opinion, granting the evidence is the same as that upon which your conclusion is formed?

“A. Yes, sir.

“Q. If it is not, you will change your opinion?

“A. Yes, sir.

“Q. Unless you hear something else, you will maintain the opinion you have?

“A. Yes, sir.”

After which the juror stated, in reply to a question from the court, that if what he had heard was true, then he had an opinion; but if it was not true, he should not go by it. And thereupon the court again overruled the challenge for cause, and the defendant challenged peremptorily; but, having exhausted his peremptory challenges, the juror was sworn, and took his seat upon the jury. It may be added that the defendant was forced to resort to his peremptory challenges in the case of several other jurors whose answers had developed a state of opinion equally as positive, as that of this juror.

It would be a useless and almost interminable task to explore the various decisions of the several States for the purpose of reconciling them and deducing therefrom a uniform rule as to the competency of a juror in a criminal case. The decisions of scarcely any one State are reconcilable with each other, and the mind would be lost in bewilderment at the threshold of the attempt. Evidently in the adjudication of particular cases the courts have not been guided by any fixed principle, and, as a consequence, our jurisprudence in this respect has long since been launched upon a sea of chaos. This is scarcely to be wondered at when it is remembered that, apart from the contrariety of statutes, the subject involves the condition of

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the human mind, with all its frailties and infirmities, and that investigations must necessarily proceed without the aid of satisfactory evidence in most instances, and determinations must oftentimes rest upon conjecture or remote and unsatisfactory inference. Some cases hold that the opinion of the juror must be positive; others that it must be decisive and substantial; others, fixed and not hypothetical; others, deliberate and settled; and others that it must be based upon testimony and not mere rumor.

Our own court has been seldom called upon to adjudicate the question, and no decision covering this particular case has been found in our reports. In the case of *Burrell v. The State*, 18 Texas, 713, the juror appeared to have had an impression, but not an opinion, from having talked with a witness; but the decision rested upon the ground that the defendant had not exhausted his peremptory challenges, and the juror, upon a challenge for cause being overruled, was challenged peremptorily, and did not sit in the case. In *Monroe v. The State*, 23 Texas, 210, the juror had formed a partial opinion from having heard a part of the evidence before the examining court, which might influence his verdict, but he thought not; but he had no established opinion at the time of trial. He was challenged peremptorily, and did not sit. In *Cotton v. The State*, 32 Texas, 614, and in *Johnson v. The State*, 27 Texas, 758, the defendants did not exhaust their peremptory challenges and the objectionable jurors did not sit. So also in *Thomas v. The State*, 36 Texas, 315; and in *Grissom v. The State*, 4 Texas Ct. App. 374, the objectionable juror was disposed of by peremptory challenge. In *Black v. The State*, 42 Texas, 377, the juror had read what the court presumed to have been a report of a former trial in the newspapers, and was adjudged incompetent.

It is true, as has often been said in later years by judges in delivering opinions, that the times have changed, and that now the telegraph and the daily press bring to our

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doors each morning full reports, from all parts of the civilized world, of any unusual occurrence that may transpire; and it cannot be expected that the intelligence of the land who now fill our jury-boxes shall remain in ignorance of great crimes occurring in our midst, or are to be lightly discarded from jury-service because their intelligence prompts them to form some opinion from what they may read concerning these occurrences. While we remember this, we should not be unmindful of other important considerations, two of which are, that amid all this rapidity of thought and its transmission the Constitution remains the same, and so does the mind of man. We can lay aside our opinions, our prejudices, and our convictions, with no more ease and certainty to-day than our forefathers could one hundred years ago; and that provision in our Constitution which guarantees to every person accused of crime "a speedy public trial by an impartial jury" means to-day what it did centuries ago, when first wrested from tyranny and consecrated with blood.

In this investigation the inquiry is addressed exclusively to the present condition of the juror's mind; and the modes by which he has reached his conclusion, if he has such conclusion, are wholly immaterial except in so far as they may tend to illustrate the strength of the conclusion, or its weakness. A mere impression, though derived from the testimony, does not disqualify if it be perfectly apparent, not from what the juror may say, but from all the evidence bearing on the issue, that such impression will not influence his action in finding a verdict. And on the other hand, a disqualifying opinion may be formed from mere hearsay, which is expressly recognized by our statute (Pasc. Dig., art. 3041), and by our decisions (*Shaw v. The State*, 27 Texas, 750; *Grissom v. The State*, 4 Texas Ct. App. 386). The fact that a juror may say that notwithstanding his opinion formed from hearsay he can try the case impartially, manifests in most instances a recklessness of judgment

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and a state of mind less prepared to receive and allow a fair defence than if he had believed on proof which furnishes at least *prima facie* evidence of guilt. *The People v. Mather*, 4 Wend. 229; *The People v. Gehr*, 8 Cal. 259; *Armistead v. The Commonwealth*, 11 Leigh, 657.

The case of *Staup v. The Commonwealth*, 74 Pa. St. 458, is generally regarded as a leading case in support of the opposite doctrine; but when the decision of the court is separated from the language of the judge who delivered the opinion it will be found not inharmonious with the general current of American authorities. In that case a number of jurors said they had formed opinions as to the guilt or innocence of the prisoner from hearing or reading the testimony on the former trial, which opinions still rested on their minds. They were all challenged for cause, but the challenges were overruled. Amongst others was J. Evans Finley, who in answer to the question put to him said: "Have formed and expressed an opinion as to the guilt or innocence of the prisoner; read evidence of former trial; still entertain that opinion, which it would take some evidence to remove; this opinion would not bias or influence my judgment if I were sworn as a juror; this opinion was formed from reading evidence of former trial; if sworn as a juror, I could and would make up my verdict exclusively upon the evidence given here, uninfluenced and unbiased by my present opinion." The prisoner challenged him for cause, but the challenge was overruled, and the juror sworn over the objection of the defendant. The court, on appeal, held the juror disqualified, and that the court below erred in overruling the challenge for cause. And Judge Agnew, in delivering the opinion of the court, used this language: "Whenever, therefore, the opinion of the juror has been formed upon the evidence given in the trial at a former time, or has been so deliberately entertained that it has become a fixed belief of the prisoner's guilt, it would be wrong to receive him. In such a case the bias must be too

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strong to be easily shaken off, and the prisoner ought not to be subjected to the chance of conviction it necessarily begets."

And Judge Ector uses similar language in the *Grisson Case* (4 Texas Ct. App. 386), the actual decision in which was that an opinion or impression entertained sometime before the trial, but which is not expressly shown to exist at the time of the juror's examination, and which, from the evidence, was not likely to influence his finding, did not disqualify. But, as said before, the juror in that case did not sit; in which event the question would have presented a different phase, and one demanding the exercise of greater caution in its determination. Upon this question of a juror's disqualification by reason of an opinion founded on rumor, see *Meyer v. The State*, 19 Ark. 156; *Boone v. The State*, 1 Kelly, 631; *Willis v. The State*, 12 Ga. 444; *Maddox v. The State*, 32 Ga. 581; *Neeley v. The People*, 13 Ill. 685; *The State v. Jewell*, 33 Mo. 583; *The Commonwealth v. Kyapp*, 9 Pick. 496; *Cotton v. The State*, 31 Miss. 504; *Fouts v. The State*, 7 Ohio St. 471; *McGowan v. The State*, 9 Yerg. 184; *The State v. Godfrey*, Brayt. 170.

Mr. Bishop, our most thoughtful and philosophic writer on criminal law, after a full citation of the leading American authorities, deduces the true rule as follows: "The true view would seem to be, that since the law presumes every man to be innocent until he is by judicial evidence proved in a court of justice to be guilty, and since the burden is on the prosecuting power to make the guilt appear affirmatively by proofs produced at the trial, if a man leaps in advance of the law, and settles in his own mind the question of guilt against the prisoner, whether by reason of what he has read or heard, or by reason of an inner impulse which condemns before it hears, he is not a fit person to be a juror in the cause; for his mind, which ought at least to be a blank on which the evidence might write its conclu-

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sions, is already preoccupied. It is vain for a man to say, or even believe, that he can judge impartially of a matter which he has already determined. Human nature, as developed in the average of men, does not permit this. The juror is to hear, and then say what he believes; but if he believes before hearing that only which can lawfully affect his belief, namely, the testimony of the witnesses in open court, he is, in legal reason, disqualified to hear and be swayed by the testimony. It is immaterial, therefore, whether the belief, which comes not according to the law, is derived from rumor, or from listening to statements of a more reliable sort. Likewise, if the juror has not expressed his belief, he is still unfit, though the expression of it might render him unfit in a yet higher degree. Such is the legal reason which should govern the question." 1 Bishop's Cr. Proc., sect. 910.

Judge Marshall, in passing upon the question in *Burr's Case*, used these words: "I have always conceived, and still conceive, an impartial jury, as required by the common law and as secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it. This is not to be expected—certainly the law does not expect it—where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him." *Burr's Trial*, 128.

Judge Taney, in a criminal trial in 1854, held that, "if the juror has formed an opinion that the prisoners are guilty, and entertains that opinion now, without waiting to hear the testimony, then he is incompetent." *Whart. Cr. Law*, sect. 2981.

Similar views were expressed by the chief justice in *Black v. The State*, and it was there said that the fact that the juror himself said it would require other and different

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evidence to change his opinion showed or at least rendered it probable, that it was with some considerable attention to and consideration of the facts reported that he had formed his conclusion. And it was further held that if upon an examination of the juror it was doubtful whether he was impartial or not, it would be safer, and more in unison with the spirit of our Constitution and laws relating to the trial by jury, to decide against the qualification of the juror. 42 Texas, 382, 383.

While we recognize the rule that the action of the lower court in passing upon the qualifications of a juror should not be reviewed except in a clear case (*Reynolds v. United States*, 8 Otto, 157), yet after a careful consideration of the law and the facts pertaining to the juror Sanders we are constrained to say that he was not a fit person to pass upon the life of the prisoner. From his own testimony, he had formed an opinion that the prisoner was guilty at the time he had first heard of the occurrence, which opinion had remained with him from that time continuously to the time of trial, a period of nearly two years. He had heard the case talked about a great deal, believed what he had heard, and had frequently expressed the opinion that the defendant was guilty, and that he would take his seat upon the jury prepared to act upon it as an established opinion in case he heard nothing else to change it. In the language of Hawkins, the juror "hath declared his opinion beforehand that the party is guilty;" and according to the doctrine accepted nearly everywhere in the United States, and probably in every other locality where the common law prevails, he was incompetent. 1 Bishop's Cr. Proc., sect. 909. Certainly the repetition of his examination as many as six different times by the respective parties and the court is most convincing that his qualifications were of so doubtful a character that he should have been rejected on a challenge for cause.

The other errors assigned, including numerous objections

Syllabus.

to the testimony, have received our careful consideration, but none of them are deemed sufficiently material to require discussion. The charge of the court was a most admirable exposition of the law applicable to the case, and its highest commendation lies in the fact that, from the array of learned counsel who represented the defendant in this court, no word of criticism was heard.

The appellant, stranger though he is and guilty though he may be, has not had a fair and impartial trial, in that he was deprived of the right of inquiry as to the mode and manner of his presentment, and was tried by a juror who had already prejudged his case. Let the judgment therefore be reversed, and the cause remanded for further proceedings in accordance with the forms of law.

Reversed and remanded.

ROLAND RUCKER v. THE STATE.

1. MURDER—INDICTMENT may, in a single count and without duplicity, charge the accused with the murder of two or more persons by the same act. Note collocation of authorities in the opinion.

2. SEVERANCE among defendants is possible only when two or more are jointly charged in the same indictment.

3. PRACTICE. — If several persons are separately indicted for the same offence, neither has a right to have another tried before himself. The act of March 16, 1874, enabled one defendant jointly indicted with another, on obtaining a severance, to have his co-defendant first tried, with the view of qualifying him as a witness by an acquittal; but this act had no application to persons separately indicted for the same offence.

4. SAME. — A motion to have a separately indicted confederate tried first is addressed to the discretion of the court, and its action on the motion is not revisable on appeal.

5. CONTINUANCE. — Counter-affidavits are admissible to show that due diligence had not been used to enforce the attendance of the absent witness on whose account a continuance is asked, — as, for instance, that, though the witness had removed to another county, no attachment for him had been obtained.

6. EVIDENCE. — In a trial for murder the State was allowed, over the defend-

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| 7 | 549 |
| 28 | 27 |
| 28 | 315 |
| 7 | 549 |
| 30 | 583 |
| 31 | 243 |
| 31 | 314 |
| 32 | 259 |
| 7 | 549 |
| 36 | 129 |

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ant's objection, to put in evidence an indictment against the defendant for an assault upon one W., and also an indictment against said W., and his bail-bond on which the deceased was a surety. There was evidence of ill-will and threats of the defendant against the deceased on account of the latter thus befriending W. *Held*, in view of the other evidence, that the evidence objected to was admissible to show motive and identity.

7. **NEW TRIAL.** — When there has been a severance of co-defendants, if one of them be convicted and afterwards the other be acquitted, the former will be allowed a new trial for the purpose of obtaining the testimony of the latter, provided it is shown that the testimony will be not only legal and competent, but such as will probably change the result of the case. In resisting such an application the State may show the acquitted defendant and his testimony to be unworthy of belief, and therefore not such as could change the verdict. Note the present case in illustration.
8. **PRACTICE.** — Counsel for the State in a trial for murder used before the jury in the concluding argument an allegorical drawing to depict the chain of circumstantial evidence relied on to identify the defendant as one of the assassins. The defence made no objection at the time, but assign the use of this "caricature" as one of the causes in the motion for a new trial. *Held*, without discussing the merits of the objection, that it should have been raised at the time, and was not available when primarily mooted in the motion for a new trial.
9. **ACCOMPLICE TESTIMONY.** — The ruling on this subject in *Noftsinger v. The State*, ante, p. 801, referred to with approval.

APPEAL from the District Court of Anderson. Tried below before Hon. R. S. WALKER.

The midnight assassination of Dr. R. P. Grayson and his wife, at their home in Anderson County, on April 23, 1878, was a deed characterized by circumstances of unsurpassed atrocity. Roland Rucker, the appellant, is one of the seven persons to whom it was imputed by the grand jury of that county, where the several parties charged, as well as the deceased, had their homes. The evidence in the case, elicited in great detail from many witnesses, was to a great extent circumstantial. The leading facts will be found clearly stated in the concluding portion of the opinion of this court.

An analysis of the indictment and a statement of all special matters germane to the rulings will also be found in the opinion. The drawing or "caricature" used by

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counsel for the prosecution in the concluding argument to the jury, and of which mention is made in the opinion, represented the corpse of Grayson at one end of a chain, and at the other end a boat containing seven men, over whose heads were written the names of the appellant and the six other persons charged with the crime. In the links of the chain were words indicative of the circumstantial proof relied on by the prosecution. The counsel who used this drawing claimed that it was a legitimate response to illustrations employed in argument for the defence.

The conviction was for murder in the first degree, with death adjudged as the penalty. After the affirmance of the judgment by this court, a motion for rehearing was filed, but it was overruled. The arguments of counsel filed in this court are of signal ability; but they are too elaborate for insertion at length, and nothing less would do them justice.

R. A. Reeves and Gammage & Gregg, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. In the indictment in this case Roland Rucker, the appellant, is alone charged with the murder of Dr. R. P. Grayson and his wife, Marian Grayson, in Anderson County, Texas, on the night of the twenty-third day of April, 1878. There are three counts contained in the indictment. In the first and second it is alleged that appellant committed the deed in connection with other evil-minded persons, who are not named, — the only difference in these two counts being that in the first it was charged a rifle-gun was the instrument, whilst the second alleged that a pistol was the means used in the accomplishment of the deed.

It is charged in the third count that Roland Rucker committed the murder, in connection with Hugh Du Puy, Reuben Rucker, Charles Key, Melville Quisenberry, James Quisenberry, and Fayette Bowen, all of whom engaged in

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the assault and inflicted the mortal wounds with guns and pistols. But these last-named parties are not directly and specifically charged anywhere in this indictment with the murder, nor does the third count seek further to embrace them in the crime than by way of inducement as to the circumstances and the manner and the means used and availed of in its perpetration by the defendant, Roland Rucker. It may, however, be well to state in this connection that at the same term of court in which this indictment was preferred all the parties named in its third count were indicted in other indictments for this same murder; two of the other indictments being joint, to wit, one against Reuben Rucker and Charles Key, and the other against Hugh Du Puy and James Quisenberry.

A motion was made by defendant to quash the indictment upon the ground that it was duplicitous and that it charged the commission of two distinct offences against two different persons; and that a charge for the murder of two persons could not be joined in one count or in one indictment for murder. Mr. Archbold, in his standard work on Criminal Pleading and Practice, vol. 1 (6th Am. ed.), side p. 96, says: "There is no objection to charging a defendant in one count with assaulting two persons when the whole forms one transaction." Citing *Rex v. Benfield*, 2 Burr. 984, an opinion delivered by Lord Mansfield, C. J.

Mr. Wharton says: "A man may be indicted for the battery of two or more persons in the same count, or for libel upon two or more persons when the publication is one single act, or for a double homicide by one act, * * * without rendering the count bad for duplicity." 1 Whart. Cr. Law (7th ed.), sect. 393.

"In *Regina v. Giddings et al.*, 41 Eng. Com. Law, 344, the indictment, which consisted of but one count, charged the four prisoners with assaulting George Pritchard and Henry Pritchard, and stealing from George Pritchard two shillings and from Henry Pritchard one shilling and a hat, on the

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14th of May, 1842. It appeared that the persons assaulted were walking together when the prisoners assaulted and robbed them both. A motion was made to put the counsel for the prosecution to his election, upon the ground that the count charged two distinct felonies; but the court held that as the assaulting and robbing of both individuals occurred at the same time, it was one entire transaction."

Shaw v. The State, 18 Ala. 547.

In *Ben v. The State*, 22 Ala. 9, it was held that "in an indictment against a slave for administering poison to white persons a count was not demurrable for duplicity which charged that the defendant did administer to and caused to be administered to and taken by *three* certain white persons a large quantity of arsenic," etc.

In the celebrated case of *Clem v. The State*, 42 Ind. 420, the court says: "If it be true, as we suppose it is, that the killing of two or more persons by the same act constitutes but one crime, then it follows that the State cannot indict the guilty party for killing one of the persons, and after conviction or acquittal indict him for the killing of the other; for the State cannot divide that which constitutes but one crime, and make the different parts of it the bases of separate prosecutions."

The Supreme Court of Tennessee, in *Womack v. The State*, say: "Two totally distinct and separate felonies cannot be charged in the same count of the indictment; and if it appears upon the face of the indictment that the defendant is charged in the same count with the killing of two persons as distinct transactions, the indictment would be quashed. But a single felonious act may result in the death of two individuals; and though in such a case the offender might be indicted for the murder of one only, he may be indicted for a single offence of murder in the act of slaying both." 7 Coldw. 508.

That the same offence has been charged in different counts to have been committed with different instruments

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or weapons does not tend to render the indictment invalid or duplicitous; for, as we understand the practice as it has always existed, it is but reenacted or formally declared by a new provision inserted into our Revised Code to the effect that "an indictment or information may contain as many counts charging the same offence as the attorney who prepares it may think necessary to insert, and an indictment or information shall be sufficient if any one of its counts be sufficient." Code Cr. Proc., art. 433; *Waddell v. The State*, 1 Texas Ct. App. 720; *Weathersby v. The State*, 1 Texas Ct. App. 643; *Barnwell v. The State*, 1 Texas Ct. App. 745; *Dalton v. The State*, 4 Texas Ct. App. 333; *Williams v. The State*, 59 Ga. 400. Involving and declaring the same doctrine are the following cases decided in this State: *Long v. The State*, 43 Texas, 467; *Wilson v. The State*, 45 Texas, 76; *Quitow v. The State*, 1 Texas Ct. App. 48; *Addison v. The State*, 3 Texas App. 40.

No error was committed by the court in overruling defendant's motion to quash the indictment in this case.

2. Defendant's first bill of exceptions was taken to the action of the court in forcing him to trial before the case of *The State v. Reuben Rucker and Charles Key*, indicted together for this same murder in another and separate indictment from defendant, had first been tried and disposed of. Though separately indicted, it appears that at the January term, 1879, this defendant made a motion for a severance from several other of the separately indicted defendants, stating as a reason for the motion that there was no evidence against such other defendants, that their testimony was material to the defence, and that he desired their trial and acquittal that he might have the benefit of it. A severance was granted him, and an order entered that Charles Key should first be tried. Again, at the May term, 1879, he renewed his motion for a severance, and asked that the case of Reuben Rucker and Charles Key be first tried. The bill of exceptions, which is presumed correct since it is signed

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and certified by the presiding judge, states that this motion for severance was again granted by the court on the 26th of May, and that on the same day (26th) the case of *The State v. Reuben Rucker and Charles Key* was called for trial, and on application for the State was continued. Upon the following day appellant's case was again called for trial, when he made a motion to postpone the trial, setting forth in his motion the previous orders of severance and that they were unrevoked, and asking their enforcement and observance as to the order of trial. It is claimed that the court committed a grave and most serious error, and one greatly prejudicial to the rights of defendant, by overruling this motion and forcing him to trial.

Now though the defendant's application for severance was made in conformity with the provisions of the act of March 16, 1874, amendatory of art. 587 of the Code of Criminal Procedure (Gen. Laws, 14th Leg. 29), it is clear that he was not entitled to a severance under the statute, since it was passed for the benefit of, and applies solely to, defendants "jointly prosecuted," and does not apply to cases of separate and distinct prosecutions. *Boothe v. The State*, 4 Texas Ct. App. 202. His application, however, was doubtless considered good by the judge granting it, under the provisions of art. 230 of the Penal Code (Pasc. Dig., art. 1826), which provides that "persons charged as principals, accomplices, or accessories, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another; but they may claim a severance, and if any one or more be acquitted they may testify in behalf of the others."

So far as we are aware, this statute has never been construed (except in *Boothe's Case*, above cited, and there only by implication) to mean that a severance was intended to be allowed to parties separately indicted. We are aware that such a construction is generally claimed for it, and upon a cursory reading would seem to be warranted by the unqualified expression "but they may claim a severance."

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Still we can but think that to so hold would be a misapplication of terms, and wholly inconsistent with the plain import of the word "severance," which means "the act of severing," "separation," "the act of dividing or disuniting." How is that susceptible of separation which has never been joined, or that of being disunited which has never been united? We believe that the plain meaning and intention is and was to make the words "but they may claim a severance" apply to persons charged as principals, accomplices, and accessories in the same indictment, and that in such joint indictments only was it intended a severance might be claimed. This construction harmonizes with art. 587 of the Code of Criminal Procedure (Pasc. Dig., art. 3052), which was adopted at the same time the Penal Code was adopted, to the effect that "where two or more defendants are *jointly* prosecuted they may sever on the trial at the request of either;" clearly showing that a severance could only be had in a case of joint prosecution. At the same time it was the further object and purpose of the law (art. 1826) to prevent persons jointly or separately indicted for the same offence from testifying for one another until the party so testifying had been previously tried and acquitted of the offence charged against him. The statute to this extent changes the common-law rule of evidence which allowed one indicted as an accomplice, if not put on trial at the same time with his companions in crime, to testify as a competent witness either for or against them. 1 Greenl. on Ev., sect. 379. In so far, then, but no farther, does the Code change the rule at common law, that, while the prosecution is pending against all the defendants and they all stand charged (no matter how, so they are charged) with the perpetration of the same crime, if neither have been acquitted nor convicted they are incompetent to testify as witnesses for one another. This, we think, is the extent of the change of the rule of evidence effected by the Code. *Tilley v. The State*, 21 Texas, 200.

Before the adoption of the Code the common law fur-

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nished us with the rule of evidence, and in addition to it the defendants jointly indicted and put upon trial could also avail themselves of a right which in effect was equivalent to the severance as afforded in the statute, by asking, after the evidence for the prosecution had been introduced, that the jury be then required to pass upon the same so far as one or more of the defendants were concerned against whom there was slight or no evidence, in order that if they were acquitted their co-defendant or co-defendants might have the benefit of their testimony. *Jones v. The State*, 13 Texas, 168; *Bybee v. The State*, 36 Texas, 366.

The act of March 16, 1874 (Gen. Laws 14th Leg. 29), which only carries out and harmonizes with the above construction, amended art. 587 of the Code of Criminal Procedure, and in addition to the right of severance theretofore given to defendants *jointly* prosecuted gave them the further right upon certain conditions to have a co-defendant first put upon trial. We are of opinion that it follows from a plain construction of all our statutes upon the subject that a severance is only demandable in cases of joint prosecution; that where the prosecution is not joint, a motion by one defendant to try another party first, indicted separately for participation in the crime, whether as principal, accomplice, or accessory, is not a right under the law, but rather a matter addressing itself entirely to the favor or sufferance of the court, and one which if granted or refused is not a subject of revision or appeal to this court.

Before the adoption of the amendatory act of March 16, 1874, and since in all cases not coming within the scope and purview of that act, where a severance of *joint defendants* was claimed and granted, the uniform rule, no matter what the ground of severance as sought by defendant might be, was that the prosecution had the unquestioned and undisputed right to elect which of the joint defendants should first be tried. *Boothe v The State*, 4 Texas Ct.

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App. 202. The object of the amendment was to confer upon the defendant a right in joint prosecutions, to which he was not before entitled, of compelling not only a severance, but of selecting the party who should first be tried. But, as before stated, this act also applies only to joint prosecutions. We are clearly of opinion, upon mature consideration of the law in all its aspects, that there is and can be under our statutes no such thing as severance except in cases of prosecution by joint indictments. If such a construction should appear to be harsh in cases where, though the indictments are separate, the offence is clearly one and the same transaction, we say the defect in the law or the harshness of the rule is one which addresses itself for change or modification to legislative action, and cannot demand unauthorized judicial legislation to give it a different effect.

In its application to the question under consideration, it follows from the above reasoning that at the time the court below granted to the appellant a severance from Reuben Rucker and Charles Key no such thing as a severance could in law exist, the parties being separately prosecuted. Further, that an order that Reuben Rucker and Charles Key, because they were indicted for the same crime, should first be tried was one which the court might as a matter of favor grant or refuse as it saw fit in the first instance, and afterwards was one entirely within its control and in no way subject to revision. And being entirely within the control of the lower court, that court had a perfect right, after the case of Reuben Rucker and Charles Key had been called and was continued, to recall appellant's case again for trial, and force him to trial, in the absence of any other legal and sufficient reason why it should not take place at the time.

3. This brings us to defendant's second bill of exceptions, which was saved to the action of the court in overruling his application for a continuance. This was his second application, and it embraced eight witnesses for whose absence the continuance was sought. All, however, appeared and

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were present during the progress of the trial, except two, viz., W. J. Salmon and Robert Lowe. With regard to these two witnesses the prosecution filed a counter-affidavit impeaching the diligence used to secure their attendance, the substance of which was that several months before the trial each of the witnesses had removed from Anderson County. It is now the settled rule in this State that diligence may be controverted in this manner. *Hyde v. The State*, 16 Texas, 445; *Dixon v. The State*, 2 Texas Ct. App. 530; *Murry v. The State*, 1 Texas Ct. App. 174. The application shows that Lowe was subpoenaed the 12th of June, 1878, and Salmon on the 21st of January, 1879. If the counter-affidavit spoke the truth, then Salmon had ceased to be a citizen of Anderson County and was in fact a resident of Houston County when this subpoena was issued and served upon him, and it was not such process as could compel his attendance in a county in which he did not reside. *Chaplin v. The State*, ante, p. 87. The witness Robert Lowe was subpoenaed the 12th of June, 1878. On the day following (13th) defendant made his first application for continuance, which was granted, and Lowe was one of the absent witnesses therein named and whose testimony was thus desired. No additional process was ever afterwards taken out for him; and according to the counter-affidavit, this witness also, in the summer of 1878, which must have been a short time after the first continuance was granted, moved his residence to Concho County. In view of these facts, we do not think the record discloses the diligence the law requires, and consequently the court did not err in overruling the second application.

4. The fourth error assigned is the admission in evidence, over defendant's objections, of an indictment against appellant Roland Rucker and one Hugh DuPuy for an assault with intent to murder one William Wilson; and also an indictment against Will Wilson and Willis Jasper for theft of cattle, and the bail-bonds executed by these last two defendants, with R. P. Grayson, the deceased, as one of the

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sureties upon the bail-bonds. In and of itself the evidence would clearly have been inadmissible; but taken in connection with the other facts in the case, as will hereafter be seen, the evidence tended to establish a reason for and the motive which actuated the hostility of defendant towards the deceased, and was an appropriate matter to be considered and weighed by the jury, in connection with the other testimony, in determining the question of motive and fixing the identity of the murderer. *Dill v. The State*, 1 Texas Ct. App. 278; *Coward v. The State*, 6 Texas Ct. App. 60; *Somerville v. The State*, 6 Texas Ct. App. 433.

5. Most of the questions raised in the original motion for a new trial have been considered and disposed of in the conclusions above expressed with regard to the subjects discussed. Several days after the original motion was filed, defendant submitted an amended motion, setting up as a further ground for new trial that Fayette Bowen, one of the parties separately indicted for the murder, had been put upon trial and acquitted after the trial and conviction of defendant, and that Bowen was a material witness for defendant, and one whose evidence was inaccessible until his acquittal had rendered him competent to testify. Supporting this motion was the affidavit of Bowen himself, declaring the facts to which he would testify if a new trial should be awarded. These facts as stated by him are simply contradictions and denials of facts stated by the witnesses for the prosecution.

To meet this amended motion the prosecution filed the affidavits of McClure, Rogers, Durham, and Palmer. McClure's affidavit contained the substance of the testimony given by Bowen in a trial on *habeas corpus* of Roland Rucker and others for bail, on the 4th of June, 1878, shortly after they were arrested for this murder, and in which testimony Bowen declared that he and the defendants then before the court had committed the murder, and detailed the circumstances of the transaction.

The affidavit of Rogers and Durham detailed a statement

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made to them and one Gilbert by Bowen on Thursday, two days after the murder, in which he confessed that he and the other parties afterwards indicted had committed the crime.

The other affiant, J. R. Palmer, states that he was a justice of the peace and sat as an examining court on the second day of May, 1878, to investigate the charge of murder against Roland Rucker and the other defendants afterwards indicted for the murder, who were then under arrest; that Bowen appeared as a witness upon the trial; that he cautioned him before he testified that his statements might be used in evidence against him, and fully advised him of his rights in the premises; after which Bowen testified to his own guilt and that of the other defendants. In addition to these affidavits, the prosecution then produced and read in evidence the written testimony of Bowen as deposed to by him on the examining trial before Justice Palmer, in which Bowen gave a minute and detailed account of the circumstances of the murder, and named the individuals participating in it, himself and this defendant amongst them.

The motion and amended motion for a new trial were overruled by the court, and this action is made the basis of the third bill of exceptions and the fifth assignment of error.

There can be no doubt at this day as to the rule, or the correctness of the rule in proper cases, as now established in this State, that where two are jointly indicted, and one is tried and convicted, and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter, where it appears that the new evidence is legal and competent and material to his defence. *Lyles v. The State*, 41 Texas, 172; *Rich v. The State*, 1 Texas Ct. App. 206; *Huebner v. The State*, 3 Texas Ct. App. 458; *Williams v. The State*, 4 Texas Ct. App. 5; *Brown v. The State*, 6 Texas Ct. App. 286. But

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the evidence must be legal and competent, and such as would likely affect the result upon another trial.

We find the correct rule, as we believe, stated in *Graham and Waterman on New Trials*. There it is said: "An application of this kind to the court may doubtless sometimes have a strong claim for relief. The case should therefore be carefully investigated and considered with reference to the peculiar circumstances which belong to it. If the testimony of the acquitted co-defendant can be corroborated by other evidence, or if the testimony on the trial has shown that he was accused wrongfully, so that his integrity is wholly unimpeached, what is offered to be proved by him will as a matter of course have weight with the court; and if his evidence will be likely to change the verdict a new trial will be granted. But if his evidence be of a suspicious import, if it stand alone, if though acquitted it be uncertain whether he is innocent, and if his character be so far compromised as to make it doubtful whether he ought to be believed, the motion will generally be denied." 3 *Gra. & Wat. on New Tr.* 1107.

In a recent case in New York, on a motion for a new trial upon the ground of newly discovered evidence, it was held that though it appears that the proposed evidence is of a highly important character, and bears directly upon the very issue in the cause, yet, notwithstanding, a new trial will not be granted if such evidence is to be given by a witness not entitled to credit, or is not supported by such other facts and circumstances as would justify a jury in believing the story of the new witness. *Cole v. Cole*, 50 *How. Pr.* 59. It is true the case last cited is a civil case, but it will be remembered our statute declares that "a motion for a new trial based upon newly discovered testimony shall be governed by the same rules as those which regulate civil suits." *Pasc. Dig.*, art. 3137, subdiv. 6. And the testimony of an acquitted co-defendant, on a motion for new trial, has generally been classed with and treated by

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law-writers under the head of newly discovered evidence, though it cannot correctly be said that the evidence is technically newly discovered. 3 Gra. & Wat. on New Tr. 1107.

Now let us apply the rules above quoted to the testimony of Bowen as presented by this record. Does it appear that he was wrongfully charged with this murder? We have on the one hand a verdict of not guilty by a jury upon evidence not before us, and on the other his own sworn statements on the examining and *habeas corpus* trials that both he and the defendant Rucker participated in and were guilty of the murder. Is his integrity wholly unimpeached? Let his own sworn statements in these other cases answer. Out of his own mouth he is condemned of perjury either in the one or the other case, it matters not which. Would his evidence likely change the result upon another trial? The apparent facility with which he seems to have perjured himself warrants us in believing that he is devoid of all moral integrity, from which truth alone can flow; "and it shocks our sense of justice and right to suppose that statements which come from such lips can or should exercise any weight whatever in the administration of justice."

Another matter presented for the first time in the motion for new trial, and which is very earnestly urged as error in the briefs and argument of counsel, is in the manner of its presentation not a matter properly before us for revision. We allude to "the caricature," as it is called by counsel, which was a drawing prepared and used by counsel for the prosecution in the closing argument to the jury. To have made the objection to the introduction and use of this drawing as illustrative of and in connection with the argument available to defendant, he should have objected to its use at the time, and reserved his bill of exceptions if over his objections the court had permitted counsel to use and comment upon it. This was not done, and for aught that appears it was used without objection, and the afterthought by defendant that it was prejudicial to his rights could not

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be taken advantage of by him for the first time on his motion for a new trial. Whether it was proper or improper, legal or illegal, is not a matter before us for revision, and it is therefore unnecessary to notice it further.

6. We do not feel called upon to discuss the charge of the court as given to the jury, since no objection is made to it as given. Suffice it to say it was a most elaborate and learned presentation of the law upon murder of the first and second degrees, and upon the rules of law appertaining to circumstantial evidence, and on the question of *alibi*, one of the main defences relied upon. Nor was any error committed in refusing the special instruction asked by defendant as to the testimony of an accomplice. The only witness to whom this instruction was, if at all, applicable, did not come within the category of an accomplice, as was recently held by this court upon a similar state of case at Tyler, in *Noftsinger v. The State*, ante, p. 301.

7. It only now remains for us to declare whether or not the evidence as shown by the record is sufficient to support the verdict and judgment. Being a case of circumstantial evidence, we have endeavored carefully to weigh each fact necessary to the establishment of the chain of facts which as a whole should constitute the guilt of defendant to a moral certainty beyond any reasonable hypothesis. That the defence have contested every step taken by the State with great zeal and ability, as each inculpatory fact was brought to light, cannot be denied; that some apparent conflict has been created in many particulars may be admitted. But divesting the case of all extraneous and immaterial matters, and coming down to the points in the evidence which stand out in bold belief, unimpeached and unshaken, to our minds the statement of the evidence still bristles with facts which cannot be the work of chance nor be reconciled with defendant's innocence. No matter who else may have participated in this horrible murder, to us it seems clear, as it must have been to the minds of the jury

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who tried this case, that if Grayson and his wife were murdered as alleged, then this defendant was one of the murderers, if not the chief and main instigator of the foul deed.

On the Saturday before the killing we find him in Palestine, actively engaged in begging and inviting parties to go with him down into Grayson's neighborhood Tuesday night to run off negroes whom he said Grayson was protecting, and stating that they intended to get away with Grayson and the negroes if they had to kill the last d—d one of them, and that Grayson was a d—d old Radical anyway. At the same time he purchases the Henry rifle of Louis Kopf. He had already been indicted for an assault with intent to murder one of the negroes, upon whose appearance-bond Grayson had become security in another case, and he was apprehensive that under Grayson's advice he would be again indicted in the Federal court for kukluxing these negroes. This is the substance of the testimony of several witnesses, in brief, and shows the motive which was actuating him.

On Tuesday night about one o'clock an alarm is made by some one in front of Grayson's house. His wife goes to the door to ascertain the cause, and was told by the party that his (the party's) wife was sick in camp near Ironi bridge, and that he wanted the doctor to go and see her and help her if he could. Grayson got up and went out upon the gallery and asked where the sick woman was. The reply was three successive volleys from a number of guns. When Grayson was next seen he was found dead upon his threshold, with more than fifty bullet-holes in his body, while the corpse of his murdered wife was found in her bed inside the house, surrounded by her helpless little children.

The alarm is given, and by daylight a number of neighbors gather and commence to ferret out the authors of the deed. Tracks of footprints are seen at the yard fence behind which the assassins stood when the fatal shots were

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fired. Upon the gallery and ground are found pieces of wadding fired from the guns, and in the yard a number of empty shells of exploded Henry rifle cartridges are picked up. But this is not all; it had rained but recently before, and near the mouth of the lane is found the place where had been hitched the seven animals which the murderers had ridden to and from the fatal spot. The tracks of these animals were plainly to be seen and were easily followed. They are followed without trouble or loss over hill and valley and through woods and brush for between eighteen and twenty miles, until some of them lead directly to Calvin Rucker's, where this defendant lives, and they are found going no further.

These exploded Henry rifle cartridge shells, those silent but tell-tale horse-tracks, taken in connection with his own previous motives and declarations, point with the unerring certainty of fate to this defendant as one of the assassins of the unfortunate Grayson and his wife. Murder is always horrible to contemplate, but the details of this dark deed of crime may well challenge the whole catalogue to furnish a deeper, darker, or more heartless example of enormity. At the dead hour of night, with a pretended appeal to his humanity, the physician is called from his bed, and in the very act, doubtless, as he supposed, of going to alleviate human suffering in the person of a stranger, his own life and that of his innocent wife are taken by the hand of the concealed murderers, without the slightest warning or a single moment for preparation.

So far as we have been able to see from this record, the defendant has had a fair and impartial trial in the court below. He has been most ably and zealously defended by counsel learned and distinguished in the law. Every facility has been afforded him to meet the charge, and every right carefully guarded which the law concedes to one whose life is involved in the issue of trial. We are constrained to say that we have been unable to find in the whole record

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any sufficient reason why this court should disturb the action of the court below, and the judgment is therefore affirmed.

Affirmed.

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AUSTIN LEWIS v. THE STATE.

1. **CARRYING WEAPONS — INDICTMENT.** — The Revised Code does not, as did the previous law on this subject, embody in the enacting clause the exceptions prescribed; and therefore there is now no occasion for the indictment or information to negative the exemption of the defendant under the exceptions. They are matters for the defence to prove.
2. **BURDEN OF PROOF.** — Though the burden of proof never rests on a defendant in a criminal case, yet when the inculpatory facts have been proved it is incumbent on him to prove any facts on which he relies for exculpation, unless they appear in the evidence against him.
3. **THE RIGHT TO KEEP AND BEAR ARMS** in defence of one's self or of the State affords no defence against an indictment for carrying prohibited weapons.

APPEAL from the County Court of De Witt. Tried below before the Hon. O. L. THRELKELD, County Judge.

The opinion sufficiently discloses the case.

W. R. Friend, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. Under the provisions of our present Penal Code regulating the keeping and bearing of deadly weapons, it is unnecessary in an indictment to allege more than that the defendant did unlawfully carry upon his person, etc., the forbidden weapon. Under former laws, the exceptions were contained in the enacting clause, and it was requisite that each should be substantially negatived. It was never necessary to prove these negative averments, they being always held as matters of defence. *The State v. Duke*,

Syllabus.

42 Texas, 462 ; *Summerlin v. The State*, 3 Texas Ct. App. 444 ; *Leatherwood v. The State*, 6 Texas Ct. App. 247.

While the burden of proof never rests upon a defendant in a criminal case in the sense in which it is understood with reference to civil causes, yet when the facts and circumstances have been proved which constitute the offence it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or omission, unless they appear in the evidence against him. Penal Code, art. 51 ; *Leonard v. The State, ante*, p. 417.

In the case at bar, the State was only required to prove the venue as laid, and the act of carrying upon the defendant's person the prohibited weapon at some time within the period of limitation. If the defendant was a soldier or a peace-officer, etc., or was at the time on his own premises, or travelling, or in imminent danger, such fact was peculiarly within his own knowledge, and he should have shown it by the evidence either of his own witnesses or those of the State.

No attempt was made to do this, but his defence is rested upon the ground that the mere fact that he had a pistol on his person in the county of De Witt at the time alleged did not place him beyond the constitutional privilege "to keep and bear arms in defence of himself or the State." We think it did, in view of the regulations prescribed by law for bearing arms, with a view to prevent crime. Bill of Rights, sect. 23.

The judgment is affirmed.

Affirmed.

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SAMUEL BROWN v. THE STATE.

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ASSAULT WITH INTENT TO RAPE includes an aggravated assault and a simple assault or assault and battery, but does not include an attempt to commit rape. An indictment, therefore, for the former offence cannot support a conviction for the latter. There is no such offence as an attempt to commit an assault with intent to rape.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The indictment was for an assault with intent to commit rape. The court instructed the jury that they could convict for an attempt to commit rape if they found that no assault was committed, but that stupefying potions were the means used to effect the purpose. There is no statement of facts. The jury found the defendant guilty of an attempt to commit rape, and assessed his punishment at five years in the penitentiary.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. Under an indictment for rape, the defendant may be convicted either of that offence, or of an assault with intent to rape, or of an attempt to commit rape. Penal Code, art. 535 ; Code Cr. Proc., art. 714, sects. 2, 13. But it does not follow that upon an indictment for an assault with intent to rape he may be convicted for an attempt.

An assault with intent to rape includes also an aggravated assault and a simple assault or assault and battery, but not an attempt. There is no such offence as an attempt to commit an assault with intent to rape. *White v. The State*, 22 Texas, 608. The charge of the court is therefore erroneous, and the indictment will not support the verdict and judgment.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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SALLIE WALLACE v. THE STATE.

1. **INFANTICIDE.** — If a woman, with a sedate and deliberate mind, before or after the birth of her child formed the design to take its life, and after the parturition was complete and the child born alive and in existence she executed her design and took its life, it was murder with express malice and in the first degree.
2. **SAME.** — But if the design to take the life of her child was formed and executed when her mind, by physical or mental anguish, was incapable of cool reflection, and when she had not the ability to consider and contemplate the consequences of the fatal deed, and she conceived and perpetrated it under a sudden, rash impulse after the child had been wholly produced from her body and while it had existence, the crime was murder in the second degree.
3. **SAME — CHARGE OF THE COURT.** — If in a case of this character the jury might have concluded from the evidence that the defendant took her infant's life before its birth was complete, or that she caused its death by means which she used merely to assist her delivery, it was incumbent on the court to instruct for acquittal in the event the jury should so find.

APPEAL from the District Court of McLennan. Tried below before the Hon. L. C. ALEXANDER.

The indictment charged that the appellant, on March 21, 1879, and immediately after the birth of her female infant, strangled it to death by tying a string around its throat.

About sunset on the day prior to the infanticide, the defendant, a negress, came to the house of Cæsar Williams, a negro who lived about six miles south of Waco in McLennan County. Neither he nor his wife knew the defendant, but she was given a bed and stayed all night with them. The indications of her pregnant condition were observed. The next morning she got up and left the house, but returned in about half an hour, joined the family at breakfast, and afterwards went with her hostess to the cow-pen. After remaining there a little while, and complaining that she was sick, she went down to a branch about a hundred yards from the house. Cæsar's wife returned to the house from the cow-pen, and in about half an hour observed the defendant's head above the brush and bushes near the

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branch. About eight o'clock the same morning, she was seen on her way to her mother's, some four or five miles distant.

The next day Cæsar's wife and another negro woman found the corpse of a new-born infant near the branch where the defendant was seen the preceding morning. A domestic string was wound twice around its neck, and tied in a hard knot behind. The child was full-sized, with developed limbs and nails and a full head of hair. Near by was found an apron worn by the defendant when she came to Cæsar's.

A physician who at the instance of the coroner made an examination of the corpse described the indications upon which he based his professional opinion that the child had been born alive and that it was strangled to death by the string, which he said was tied tight enough to have strangled a grown person. He observed no swelling of the face or head.

Another physician, testifying for the defence, said that the signs of strangulation were swelling of the head and face, and that an absence of these signs would indicate that some other cause than strangulation occasioned the death. He further stated that there is no test enabling a medical expert to affirm that a dead infant had or had not been born alive. The utmost ascertainable from *post-mortem* observation is that the lungs had been distended with air either before or after birth, and by either a natural or an artificial process.

C. Stubblefield, for the defence, testified that, about a week before the child was found, the defendant, who had been in his employ, informed him that he would have to get another servant, as she was pregnant and would soon be confined, and wanted to go to her mother's for that purpose. He further testified that he was aroused by the defendant before day on the 19th of March, who took him to her room, where another negro woman also slept. This

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other negress was subject to fits, and was in great pain, going through all manner of contortions. Witness quieted her and returned to his bed, but was soon awakened by cries of the defendant. Going again to her room, he found her greatly excited, and engaged in a violent struggle with the other woman, who was in another fit. The defendant was greatly frightened, and was exerting every effort to get loose from the grasp of the other woman. Witness finally released her, and she ran out of the door and fell down a flight of four steps to the ground. She left his employ the same evening. She had never attempted to conceal her pregnancy from him.

The jury found the defendant guilty of murder in the second degree, and assessed five years in the penitentiary.

Williams & Inge, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. If the defendant, with a sedate and deliberate mind, anterior or subsequent to the act of parturition conceived the design to take the life of her new-born infant, and in pursuance of such formed design did take its life in the manner alleged in the indictment, and such infant was wholly produced from the body of its mother alive, and was in existence by actual birth at the time the injuries causing death were inflicted, then she would be guilty of murder with express malice. If, however, the design to take its life was formed and executed when her mind, by reason of physical or mental anguish, was incapable of cool reflection, and she was not sufficiently self-possessed to consider and contemplate the consequences about to be done, but, yielding to a sudden, rash impulse, she conceived and perpetrated the fatal deed after the infant had been wholly produced from her body and had an existence by actual birth, then she was guilty of murder in the second degree.

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We cannot say that the charge of the learned judge who presided on the trial below submitted these issues with that accuracy which usually characterizes his instructions; nor do we feel an assurance that the jury may not have been misled by the general terms employed in defining the ingredients especially of murder in the second degree. Abstractly considered, the definition may not be inaccurate in ordinary cases, but in this case the better practice would have been to have submitted that issue substantially as above indicated. In this particular case, it is not well conceived how any legal provocation, excuse, or justification could arise, if the defendant strangled her own child after birth; and the instruction was practically tantamount to an announcement that the defendant was guilty of murder in the second degree if she voluntarily and intentionally killed the child by the manner and means alleged.

We are also of opinion that the charge is materially defective in another respect. The issue of strangulation before birth was not submitted to the jury. It is true that among other definitions the jury were told that "in order that a child be in existence by actual birth, the parturition must be complete, and the body of the child must be expelled from the mother, and it must be alive; so that the destruction of vitality in a child before it is completely born is not murder, under whatever circumstances committed." But after applying the law to the particular case with reference to murder in the two degrees, it was incumbent upon the court to do likewise with reference to that phase of the evidence which might tend to the exoneration of the defendant. Presented in the form of an abstract proposition, it was not brought to the attention of the jury with that distinctness which the law demands. If they believed from the evidence that the defendant took the life of the deceased, by the means and in the manner alleged, yet the same was done before the child was completely born, or if they believed from the evidence that the means

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used, and which resulted in death, were merely for the purpose of assisting delivery, in either event they should acquit.

The instructions asked on circumstantial evidence should also have been given. *Harrison v. The State*, 6 Texas Ct. App. 42; *Hunt v. The State*, ante, p. 212.

The judgment is reversed and the cause remanded.

Reversed and remanded.

BRAGG WRIGHT v. THE STATE.

1. **ACCOMPLICE TESTIMONY.**—A detective who for the purpose of discovering crime ostensibly aids in its commission is not an accomplice within the meaning of the provision of the Code which prohibits a conviction on the uncorroborated testimony of an accomplice.
2. **SAME—CHARGE OF THE COURT.**—The principal State's witness, as appeared by his own and other testimony, acquired his knowledge of the offence in the character of a detective and feigned accomplice. *Held*, that the court below correctly submitted to the jury the question whether the witness was or was not a guilty confederate, with appropriate instructions upon the law controlling accomplice testimony, and its effect upon the case if they found the witness to be such a confederate.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The trial and conviction were for the theft of a beef, the property of W. W. Wright.

M. C. Holden, the principal witness for the State, testified that for about a month in the year 1878 he worked for the defendant in gathering and driving cattle, and while so employed saw the defendant change into his own brand the brand upon a beef branded in the brand of W. W. Wright. Witness did not assist the defendant in altering the brand, but came to the pen and saw it done by the defendant. He could not describe the defendant's brand. On cross-examination he stated that he was a member of

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Capt. Hall's company of State troops, and had been detailed as a detective to watch the defendant, and therefore hired to the defendant, who was suspected of not dealing fairly with cattle. He continued in the defendant's employ, assisting in his cattle transactions, until he effected his object. He received no compensation as a detective.

Capt. Hall testified to the same effect in regard to Holden's service as a detective. There was no other corroboration of Holden's testimony respecting the *corpus delicti*; but several other witnesses testified with regard to the other allegations in the indictment.

Pat O'Docharty and W. D. Givens, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The only question presented in the record and discussed in the brief of counsel for the appellant requiring special consideration is this: Is the uncorroborated testimony of a detective of itself sufficient to warrant a conviction? The position of counsel for the appellant is that the testimony of such a witness is that of an accomplice, and that the court should have so charged the jury; that it was error for the court to submit to the jury the question as to whether he had any such guilty participation in the crime of which the defendant was accused as to require such corroboration or not.

The judge who presided at the trial gave the jury the following charge as applicable to the witness who testified against the defendant: "If you believe from the evidence that the witness Holden was present when the animal was taken by Bragg Wright, if it was taken by him, and aided, assisted, or encouraged said Wright in taking said animal, and his action therein was done with a criminal intent, you must acquit the defendant, unless you find that his evidence is corroborated by other evidence connecting the defendant

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with the offence committed; and the corroboration is not sufficient if it merely shows the commission of the offence. If, however, you believe said witness was employed as a detective by the State of Texas, and was acting as such in ferreting out crime, and his action with the defendant at the taking of said animal was solely for the purpose of discovering crime, his evidence requires no corroboration; if you believe it sufficient to convict upon, you will receive it and act upon it the same as any other testimony."

We concede that the authorities cited by the counsel in his brief maintain the position that the uncorroborated testimony of an accomplice will not alone be sufficient to warrant a verdict of guilty in any criminal case. This is specially provided for in the Code, as follows: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offence committed; and the corroboration is not sufficient if it merely shows the commission of the offence." Code Cr. Proc., art. 741.

Whilst it may be admitted that the language of the charge may be obnoxious to criticism, especially that portion which set out the principle that one who participates in the crime committed, with a guilty intent, is an accomplice in the sense requiring corroboration, it is believed that it was sufficient under the proofs to apprise the jury, if they believed from the testimony that the witness participated in the offence for which the defendant was being tried, with a guilty intent to aid the defendant in its perpetration, that then they could not convict the defendant on the testimony of this witness, unless they find "that his evidence is corroborated by other evidence connecting the defendant with the offence committed." This, however, does not fully meet the question. The charge further instructed the jury, in effect, that if the jury believed from the testimony that the witness Holden in his participation in the transaction was simply acting in the capacity of a

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detective, and without guilty intent, but solely to aid in ferreting out crime of which the defendant had been suspected, that then he did not stand in the relation of one whose testimony required corroboration, but that he stood as any other witness, and subject to have his testimony weighed by the jury as that of any other witness in the case. We are of opinion that the court did not err in submitting the testimony to the jury, or in refusing a new trial on the ground that the verdict depended upon the testimony of this witness.

We are not aware that this precise question has before been presented to any of the courts of last resort in this State. The time allowed us for investigation has afforded but few cases in other States. Cole, J., in *The State v. McKean*, 36 Iowa, — (reported in 2 Greene's Cr. Rep.), in treating of a similar subject, says: "The authorities upon this question are few; indeed there is but one case we have found in which the point was directly ruled. That case is *Rex v. Despard*, 28 How. St. Tr. 346, 387." There was found some difference between *Despard's Case* and the one the judge was considering; but the judge, in deciding *McKean's Case*, said: "The court left the credibility of the witness, and the weight to be given to his testimony, entirely to the consideration of the jury. Of these they were the proper judges. We do not see how we can interfere with the action of either court or jury." In *The People v. Farrell*, 30 Cal. 316, it was held that "the rule that a defendant cannot be convicted of a criminal offence on the testimony of an accomplice, unless the same is corroborated, does not apply to a feigned accomplice." On these authorities we hold in the present case that, *first*, the court did not err in submitting to the jury the question as to whether the witness Holden was an accomplice or not; and, *second*, that the credibility of the witness being fully submitted to the jury, and they having given full credence to the testimony, the conviction will not be set aside,

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though resting mainly, if not entirely, on the testimony of a detective. Otherwise, the case is one of conflict of testimony. The writer has great sympathy with the argument of counsel as to the general subject of the testimony of hired detectives and spies upon the conduct of others, but must say the remarks do not apply with full force to the witness in the present case. The judgment is affirmed.

Affirmed.

JORDAN BURT v. THE STATE.

1. **EVIDENCE — PRACTICE.** — In cross-examining a State's witness, the defence asked questions which were explicitly answered on his direct examination, and the court below excluded answers on objection by the State. *Held*, that no objection to the questions is apparent, but, as they could only have elicited testimony already given, no prejudice to the defendant or material error is shown.
2. **THEFT.** — Indictment for theft of cattle alleged the property and possession to be in one H. The proof showed that the cattle belonged to the wife of H., but were under his exclusive management and control, and were taken therefrom without his consent, or that of his wife so far as he knew or believed. The court charged the jury that to convict they must find that H. was the owner or had the management and control; and refused a general instruction to the effect that if the ownership was in one person and the control in another the want of the consent of both must be shown. *Held*, in view of the evidence and the provisions of the Code, that the charge given was correct, and there was no error in refusing the instruction requested.

APPEAL from the District Court of Menard. Tried below before the Hon. W. A. BLACKBURN.

G. W. & H. Chilton, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. We deem it only important in the determination of the merits of this appeal to consider specially the third and fourth assignments of error, which are set out in the record as follows: "3. The court erred in excluding

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the evidence of the witness Reynolds, for the defence, that defendant did not at any time claim, sell, nor offer or consent to sell, nor have in his possession, the cattle mentioned in the indictment, as shown by bill of exceptions No. 2. 4. The court erred in failing to give fully the law applicable to the case in charge to the jury."

1. On the subject of the exclusion of the testimony of the witness Reynolds, referred to in bill of exceptions No. 2, it is proper to say that the witness testified that he was sheriff and *ex officio* cattle-inspector for Kemble County, and wrote the bill of sale here shown him, in Kemble County, and inspected the cattle there. The witness further testified as follows: "Defendant did not sign the bill of sale himself; Deaton signed his name to it at his request. I don't know what cattle defendant put in the herd; the cattle were all together in one herd when I first saw them, and I inspected them all together." By the bill of exceptions it is shown that the defendant asked the witness the following questions: "1. What cattle mentioned in the said bill of sale did the defendant authorize the said Deaton to sign up for him? 2. What cattle in the herd in question, and mentioned in the said bill of sale, did you inspect for the defendant?" We do not see the propriety of raising the objection, or in the court sustaining the objection; still we are of opinion that the questions could have elicited no further fact within the knowledge of the witness than he had already testified to, and as shown by the extract from his testimony set out above he said he did not know what cattle defendant put in the herd, that they were all together in one herd when he first saw them, and were by the witness inspected all together. We see no material error in the ruling of the court. The statement of facts does not support the bill of exceptions, nor does either the statement of facts or the bill of exceptions, singly or together, support the assignment of errors, as we understand the record.

2. With reference to the charge of the court, it is proper

to say that no particular defect in the charge is pointed out by exceptions to the charge as given, nor by the presentation of additional charges by the defendant's counsel. True, one special charge was asked; which was refused by the court, the judge says, because substantially given in the general charge. The charge asked and refused is as follows: "When the ownership of property alleged to be stolen is in one party, and another party has the management of said property, it is necessary to prove the want of consent of both parties before a defendant can be convicted of theft of said property." As an abstract proposition, the charge enunciates an erroneous legal principle; the sufficiency of a charge must be considered with reference to the testimony to which the jury are to make the application. The charge given by the court on this branch of the investigation was as follows: "Before you can convict the defendant, in addition to the other facts necessary to constitute the crime of theft, it must be proved that Charles M. Hubbell was the owner of the property, or that he had the control and management of it." This charge, we are of opinion, was substantially correct, and applicable to the facts in evidence.

The Code of Criminal Procedure provides that "it is not necessary, in order to constitute theft, that the possession and ownership of property be in the same person at the time of taking." Art. 728. "Possession of the person so unlawfully deprived of property is constituted by the actual control, care, or management of the property, whether the same be lawful or not." *Fore v. The State*, 5 Texas Ct. App. 251; *Trafton v. The State*, 5 Texas Ct. App. 480. These articles are conclusive of this question. The indictment alleges the property in Hubbell. The proof shows that though the property belonged to his wife, he had exclusive control over it.

We find no such error in the rulings or the charge of the court as calls for a reversal of the judgment, and it is affirmed.

Affirmed.

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H. STRUCKMAN v. THE STATE.

1. **BURGLARY.**—Indictment, framed under art. 712 of the Revised Penal Code, charged burglary with intent to commit theft, and also theft committed after the burglarious entry, and the State adduced evidence to prove both offences. *Held*, that the jury should have been instructed upon the law of theft as well as on that of burglary.
2. **CHARGE OF THE COURT.**—When the inculpatory evidence is purely circumstantial, the charge to the jury must expound the nature and cogency of that character of proof.

APPEAL from the District Court of Fayette. Tried below before the Hon. L. W. MOORE.

The opinion sufficiently indicates the case.

Timmons & Brown, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The indictment charges that the appellant in the night-time entered a certain storehouse described in the indictment, with intent to commit theft therefrom, with apparently appropriate averments, and proceeds to charge the commission of the theft for which the burglarious entry is averred, by taking from the storehouse one sewing-machine of the Wilson improved patent, of the value of \$40, and one five-shooting pistol of the value of \$15, without the consent of the owner, and with intent, etc. The offence of burglary is defined in art. 704 of the Penal Code, *et seq.*

Art. 712 provides that “if a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit theft, or any other offence, he shall be punished for burglary, and also for whatever other offence is so committed.” Whether a conviction for that other offence can be had on the indictment charging burglary and

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the other offence, is a question not raised in the present case. From the indictment and the evidence in the case, the intent to commit theft of the sewing-machine and pistol was a material subject of investigation, which made it incumbent on the court to give the jury such instructions as were necessary for them to determine whether the intent to commit the theft alleged in the indictment had been proved or not. This was, we are of opinion, a necessary part of the law of the case. *Simms v. The State*, 2 Texas Ct. App. 110.

We are further of opinion that, inasmuch as the evidence in the case was wholly circumstantial, the jury should have been instructed as to the nature and conclusiveness of that character of testimony, to warrant a conviction upon it. *Hunt v. The State*, ante, p. 212, where the authorities are collected and reviewed.

The objections to the indictment in the defendant's motion in arrest of judgment were not well taken at that stage of the proceedings, and were properly overruled.

Because the court erred in not defining the offence of theft, and because of a failure to give an appropriate charge on circumstantial evidence, the judgment must be reversed, and the cause remanded for a new trial.

Reversed and remanded.

F. CASTANEDO v. THE STATE.

1. PRACTICE. — To make objections to evidence available on appeal, they and the matters objected to must be set out in a bill of exceptions, or else, as now allowed by the Rules of Court, be noted and set out in a statement of facts.
2. PRACTICE IN THIS COURT. — Unless objections to evidence and the evidence objected to be brought up in the record, this court will consider only the validity of the indictment, and the sufficiency of the charge to the jury upon any state of evidence adducible under the indictment.

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3. **CHALLENGE TO THE ARRAY** is allowable only for the cause prescribed in the Code, to wit, "that the officer summoning the jury has acted corruptly, and has wilfully summoned persons upon the jury known to be prejudiced against the defendant, and with a view to cause him to be convicted."
4. **SAME.** — Unless a bill of exceptions was reserved to the overruling of a challenge to the array, the ruling is not revisable; and when, as in the present case, the record nowhere discloses that the challenge was called to the attention of the court below, the presumption obtains that it was waived.

APPEAL from the District Court of Starr. Tried below before the Hon. J. C. RUSSELL.

The opinion indicates every thing disclosed by the record.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Appellant was indicted for the murder of one Isidor Lopez, alleged to have been committed in the county of Starr on the twenty-third day of July, 1877. He was convicted of murder in the second degree, and his punishment affixed at confinement in the penitentiary for a period of twenty years. We find twelve errors complained of in the assignment of errors, most of them relating to the admissibility of evidence. There is, however, no statement of facts nor bill of exceptions in the record to enable us to determine the truth of the matters indicated.

If parties on trials in the courts below really desire to avail themselves of their objections to evidence, on appeal, they must make the objections appear either by a separate bill of exceptions, setting out the objectionable matter, or prepare a statement of facts and have their exceptions noted in the statement of facts in connection with the objectionable testimony. "Exceptions to evidence admitted over objections made to it on the trial may be embraced in the statement of facts, in connection with the evidence ob-

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jected to.” “Rules for the District Court,” Rule 56, 2 Texas Ct. App. 666. This rule was held to apply in criminal as well as civil cases, in the case of *Cooper v. The State*, decided at the late Tyler term, *ante*, p. 194. Without a statement of the facts in evidence before the court below, or a bill of exceptions disclosing the objectionable evidence, this court, on appeal, will only consider the validity of the indictment, and the sufficiency of the charge of the court to any legitimate state of evidence which might arise under the case as charged in the indictment. *Longley v. The State*, 3 Texas Ct. App. 611, and authorities cited.

In this case no valid objection is perceived either to the indictment, the charge of the court as given to the jury, nor to the refusal of the court to give the special instructions asked for defendant.

As a preliminary step, defendant challenged the array of the jury summoned to try the case, but his challenge was not even in substantial compliance with the statute, which provides that “the defendant may challenge the array [of the jury] for the following cause only: That the officer summoning the jury has acted corruptly, and has wilfully summoned persons upon the jury known to be prejudiced against the defendant, and with a view to cause him to be convicted.” Pasc. Dig., art. 3034; *Bowman v. The State*, 41 Texas, 417. Had the challenge been in conformity to law, a bill of exceptions should have been reserved to the action of the court overruling it. As it is, the record in this case does not disclose that the challenge was called to the attention of, or ever acted upon by, the court. Under such circumstances, we might well presume that it had been waived by defendant on the trial.

In the attitude of the case before us, we cannot see that any error has been committed in the lower court, and the judgment is therefore affirmed.

Affirmed.

Opinion of the court.

S. CALLOWAY v. THE STATE.

1. **EX POST FACTO LAW.** — It is well settled that a law is *ex post facto* which so alters the rules of evidence in criminal cases as to allow a conviction on less or different evidence than was requisite when the offence was committed.
2. **SAME.** — Art. 426 of the Revised Code of Criminal Procedure provides that "where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in either or all of them." This is a new provision, and warrants a conviction on different evidence than the preëxisting law, and therefore, with reference to offences committed before the Code took effect, is *ex post facto* and inoperative.
3. **DEFACING CATTLE-BRAND — VARIANCE.** — Since the Revised Codes took effect, the appellant was tried on an indictment which charged that he, in 1876, defaced the brand on a certain animal, with intent to defraud one G., alleged to be the owner. The proof showed that the animal, when the offence was committed, belonged jointly to said G. and one W., and was not under the exclusive control of either of them; and the defence moved to exclude this proof, because of variance between it and the allegation of ownership. *Held*, that the motion to exclude should have been sustained, inasmuch as the variance was fatal prior to the said new provision of the Revised Code of Criminal Procedure, which, with reference to the offence on trial, is *ex post facto* and inapplicable.

APPEAL from the District Court of De Witt. Tried below before the Hon. H. C. PLEASANTS.

The offence charged was the defacing the brand upon a certain steer yearling, the property of Free Green, without his consent and with intent to defraud him, etc. The verdict and judgment consigned the defendant to the penitentiary for two years. The evidence involved in the rulings is stated in the opinion.

W. R. Friend, for the appellant, filed a very able brief and argument.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. It is well established that a law which alters the legal rules of evidence, and receives less or differ-

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ent testimony than the law required at the time of the commission of the offence in order to convict the offender, is *ex post facto*. *Holt v. The State*, 2 Texas, 363; *Murray v. The State*, 1 Texas Ct. App. 417.

Art. 426, which is a new provision in our Revised Code of Criminal Procedure, declaring that "where property is owned in common or jointly by two or more persons, the ownership may be alleged to be in either or all of them," is an innovation upon the rules of practice and evidence as they existed before its adoption, and permits different testimony to sustain a conviction than would have been held sufficient for that purpose under preëxisting laws. Consequently it must be held inoperative as to offences committed before its adoption.

Such was the case now under consideration. The indictment alleged the offence to have been committed in September, 1876, and alleged the ownership to be in one Free Green. When Free Green was placed upon the stand to prove ownership and want of consent, he testified that the animal at the time the offence was committed belonged to himself and one T. J. Word jointly; that it was running upon the range, and was not in the actual possession nor under the exclusive control of witness. Defendant's counsel asked the court to exclude this testimony, because there was a variance between the allegation of ownership in the indictment and that proven. This motion was overruled by the court because art. 426, Revised Code of Criminal Procedure, *supra*, which was in force at the time of the trial, met and obviated the objection.

It is not necessary that the ownership and possession should be in the same person; but if the ownership is alleged, it must be proven as alleged. Possession other than constructive, in cases of theft and the like, is constituted by the exercise of actual control, care, and management of the property by the party whose possession has been violated. Pasc. Dig., arts. 2386, 2387; *Gaines v.*

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The State, 4 Texas Ct. App. 330; *Crockett v. The State*, 5 Texas Ct. App. 526. And where one has a general and the other a special property in the thing stolen, the ownership may be alleged in either. *Gaines v. The State*, 4 Texas Ct. App. 330; *Fore v. The State*, 5 Texas Ct. App. 251; *Trafton v. The State*, 5 Texas Ct. App. 480; *West v. The State*, 6 Texas Ct. App. 485.

If the stolen property belonged to joint owners, but when stolen was in the exclusive possession and control of one of them, the indictment may allege the ownership to be in the latter alone. This was the rule laid down in *Samora v. The State*, 4 Texas Ct. App. 508. Its converse is also established by authority. In *Henry v. The State*, 45 Texas, 84, it is said: "If A. and B. be joint owners, and the property not in the possession and control of either, and the pleader should allege that A. was the owner, the variance would be fatal." This last authority is directly in point, and must be held conclusive against the ruling of the court in this case in refusing to exclude the evidence upon the ground of variance. See also *Mathews v. The State*, 33 Texas, 102; *Brown v. The State*, 35 Texas, 691.

Because there was a fatal variance between the allegation of ownership and the proof, and by reason of which the latter does not sustain the former, the judgment must be reversed, and the cause remanded for a new trial.

Reversed and remanded.

M. PRENDEZ v. THE STATE.

VENUE. — Indictment for theft laid the venue of the offence in the unorganized county of E., which was attached for judicial purposes to W. County, where the indictment was found. The proof showed that the offence was committed in another unorganized county, which was attached to the county of M. *Held*, that the venue was not proved as alleged, and the conviction is set aside. *Quære*, in case both of the unorganized counties had been attached to W. County for judicial purposes.

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APPEAL from the District Court of Webb. Tried below before the Hon. J. C. RUSSELL.

The opinion states the case.

A. L. McLane, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Appellant was indicted in the District Court of Webb County for the theft of a cow, the property of one Margarito Sanchez, the venue of the offence being laid in Encinal County. The proof established beyond doubt that the crime was committed in La Salle and not in Encinal County, nor within four hundred yards of the county line. Neither of the two counties last named are organized, but the former (Encinal) is attached to Webb County for judicial purposes, whilst the latter (La Salle) is attached to McMullen for judicial purposes. Acts 16th Leg., pp. 22, 23, chaps. 24, 25.

It is clear that the venue of the offence is not proven as alleged. Whether the evidence would have been sufficient if La Salle County had also been attached to Webb for judicial purposes, it is unnecessary to decide.

Because the proof of venue does not sustain the allegation in the indictment, the judgment must be reversed and the cause remanded.

Reversed and remanded.

J. D. RAINS v. THE STATE.

1. THEFT — EVIDENCE. — In a trial for theft, the want of the owner's consent to the taking of his property by the accused may be shown by circumstances which absolutely exclude every reasonable presumption that the owner gave his consent. That the owner caused search to be made for the property is a cogent circumstance to show the want of his consent to the taking.

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2. PRACTICE.—Judges are expressly inhibited by the Code from summing up, discussing, or commenting on the evidence when ruling on a motion for a new trial. This inhibition should, in the interest of justice upon a new trial, be strictly observed; but a disregard of it does not necessitate the reversal of a conviction on appeal, when no error to the appellant's prejudice is discoverable.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The indictment charged the appellant with the theft of two beeves, the property of Richard King. Finding him guilty, the jury assessed his punishment at two years in the penitentiary.

Pat O' Docharty, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. A special instruction to the jury was asked by the defendant, in the following words: "That it must be shown by proof that the owner of the cattle charged to have been stolen did not give his consent to the taking thereof by the defendant, if they believe any such taking occurred, before a conviction of theft of the animals can be had." To which the court added: "Gentlemen, I give the above instruction with the addition that the want of consent of the owner may be shown by circumstantial evidence." The rule that want of consent may be established by circumstantial evidence is held in this State in those cases "where the circumstances proven are of such a nature as to exclude absolutely every reasonable presumption that the owner gave his consent to the taking." *Wilson v. The State*, 45 Texas, 76; *McMahon v. The State*, 1 Texas Ct. App. 102.

In the case at bar, the witness Chamberlain testified that he went to examine the cattle, and upon examination found two belonging to King, upon which King's brand had been altered. He says: "King sent me to examine the animals,

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and recover any animals of his that I might find among them." We can scarcely imagine a stronger circumstance to show King's want of consent than the fact that he sent his agent to examine the animals and recover any which might belong to him; and from that fact, in connection with the other facts proven, and the further negative fact that the defendant, in the face of this strong *prima facie* case made by the State, introduced no evidence accounting for his possession, we think the jury were fully warranted in feeling morally certain that King did not give his consent to the taking.

The matters presented in the first bill of exceptions as explained by the judge show that no error was committed to the prejudice of the defendant, but on the contrary that the jury were organized in conformity with the spirit and meaning of the statute as it has been heretofore frequently construed. *Harkins v. The State*, 6 Texas Ct. App. 452, and authorities there collated.

The second bill of exceptions states, "That upon the presentation of the motion for a new trial of the defendant in this cause, and whilst the court was rendering judgment upon said motion, the court in rendering judgment therein commented upon and discussed the evidence upon the trial; to which action of the court the defendant excepted." The action of the court was clearly wrong, and directly against the inhibition of the statute, which is that "in granting or refusing a new trial the judge shall not sum up, discuss, or comment upon the evidence in the case, but shall simply grant or refuse the motion without prejudice to either the State or the defendant." Code Cr. Proc., art. 782.

In this particular case we cannot see how, error though it be, this action of the judge could by any legitimate reason be availed of by the defendant. Inasmuch as we are clearly of the opinion, this ruling aside, that the case should in all things be affirmed, because fully substantiated by the law and the facts, we can perceive no good or even tenable

Syllabus.

reason why, when the action of the court can in no possible manner, up to this time, have operated prejudicially to the defendant, we should reverse the case in order that a harmless error may have effect when the cause is called again for trial. In other words, we are of opinion that the court did not err in overruling the motion for a new trial, however much it might have erred in discussing the case and giving the reasons for its action in doing so. Another question would have been presented had the case been one which upon substantial errors required a reversal. Then the question on a new trial would have been, how far the unauthorized discussion of the case by the judge had affected the defendant's right to a fair and impartial trial before him, and in a community where his peculiar views as to the guilt or innocence of the accused were already known. The statute is intended to obviate these difficulties upon a second trial, and judges should be careful to observe it lest they produce these very difficulties by an unnecessary zeal to maintain the correctness of their action in the first instance. It is sufficient for the judge to be satisfied merely to announce his ruling upon the motion, and beyond that the law excuses him from expressing his opinion on the merits of the case.

We have been unable to see that any substantial error has been committed on the trial below which requires a reversal, and the judgment is therefore affirmed.

Affirmed.

R. BANKS v. THE STATE.

1. **THEFT — CHARGE OF THE COURT.** — If in a trial for theft there be evidence tending to show that the taking, though tortious, was not with fraudulent intent, it is the duty of the court to submit that issue distinctly to the jury; and if, under such instructions, the jury convict the accused, the conviction will not be disturbed if there be any evidence tending to support it.
2. **SAME.** — When, in a trial for theft of a gelding, the evidence showed that

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the animal was taken from the actual possession of the owner, and not from its accustomed range, an instruction upon the offence of wilfully using, driving, or removing an animal from its accustomed range would have been inappropriate and inapplicable.

8. **PRACTICE.** — Unless instructions asked by the defence are manifestly not the law applicable to the case, the better practice is to give them, notwithstanding they have already been substantially given in the main charge.
4. **AMENDMENT.** — The court below allowed the prosecution to amend the indictment by inserting in its introductory clause the style of the court and the term to which the indictment was presented. *Held*, that the amendment was in a matter of form, and was correctly allowed.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The conviction was for theft of a gelding, and five years in the penitentiary the punishment assessed.

As originally drawn, the indictment did not show on its face the court or term to which it was presented; and, pending a motion to quash, the court allowed the prosecuting attorney to amend it in this respect. The defence reserved exceptions.

McC Campbell & Givens, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. If there be evidence tending to show that the taking was not with fraudulent intent, but only tortious, it is the duty of the court to submit that issue distinctly to the jury for its consideration; and their finding against the prisoner upon such issue will not be disturbed, unless in the absence of testimony tending to support it. Upon the trial of this cause the defendant had the benefit of very explicit instructions upon this point, and we are not prepared to say that the jury did wrong in concluding that he was guilty of theft, or that such finding was without evidence to support it. *Poage v. The State*, 43 Texas, 454; *Camplin v. The State*, 1 Texas Ct. App. 108; *Miles v. The State*, 1 Texas Ct. App. 510; *Hamilton v. The State*, 2

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Texas Ct. App. 494; *Shoefercater v. The State*, 5 Texas Ct. App. 207.

The animal seems to have been taken from the actual possession of the owner, and was not upon the range. An instruction, therefore, as to the penalty for wilfully using, driving, or removing the animal from its accustomed range would have been manifestly inappropriate, and not applicable to the case. Appellant cannot complain at the action of the court in instructing the jury, as every charge asked by him seems to have been given,—the district judge having adopted a practice which could be followed with advantage in most trials for violations of the criminal law, and that is, to give every instruction a defendant may ask, unless it is palpably and manifestly not the law applicable to the case, no matter if the main charge has already instructed the jury upon the very point substantially as asked.

The amendment of the indictment was as to matter of form simply, and with the amendment as made, it seems to be free from objection.

Affirmed.

JOE HULL v. THE STATE.

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1. **UNLAWFUL MARRIAGE.**—To sustain a prosecution for unlawful marriage, the indictment must allege and the proof show a valid marriage of the defendant, and his or her subsequent marriage during the life of the lawful spouse. Divorce, or five years' absence of the spouse without knowledge by the defendant of his or her continued existence, would seem to be matter of defence.
2. **SAME—EVIDENCE.**—The survival of the lawful spouse at the date of the subsequent marriage is a question of fact for the jury, and may be established by proof of circumstances reasonably inductive of that conclusion; but no legal presumption can be invoked in lieu of proof. The presumption of innocence at least counterbalances any presumption of the prolongation of life.
3. **SAME—CHARGE OF THE COURT.**—In effect the court below instructed the jury that when a person was shown to have been living at a certain time, his continued existence for seven years thereafter is to be presumed; and

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that the party who asserts his death within that period has the burden of proving that fact. *Held*, that the instruction was erroneous because it invaded the province of the jury, and exonerated the prosecution from proof of a material constituent of the offence.

APPEAL from the District Court of Shackelford. Tried below before the Hon. J. R. FLEMING.

The case is indicated in the opinion.

Kent & Wray, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. A prosecution for unlawful marriage can be sustained only by allegation and proof of a prior valid marriage and a subsequent marriage, the legal husband or wife being still alive. Divorce, or absence for five years, the party marrying not knowing that the other was alive, would seem to be matters of defence. *May v. The State*, 4 Texas Ct. App. 424; *Gorman v. The State*, 23 Texas, 646.

The continued existence of the lawful spouse need not be established by positive testimony, but only by such patent facts and circumstances as many enable the jury to reasonably infer such existence. No artificial rule as to presumption is allowed to obtain in such cases, and the jury must draw their own inferences from the facts, without any anticipation by the law. After much controversy in the earlier cases as to whether the presumption of innocence should outweigh the presumption of a continuance of human life for the period of seven years, it seems now to be generally conceded that, on principle, the one should be considered as neutralizing the other, though in a general way the law prefers the presumption of innocence. 1 Bishop's Mar. & Div., sect. 453; Bishop's Stat. Cr., sect. 611; 1 Greenl. on Ev., sect. 41; *Rex v. Harborne*, 2 Ad. & E. 540; *Coper v. Thurmond*, 1 Kelly, 538; *Newman v. Jen-*

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kings, 10 Pick. 515 ; *The State v. Moore*, 11 Ired. 160. And such seems to be the tendency of former decisions in our own State. *Yates v. Houston*, 3 Texas, 433 ; *Lockhart v. White*, 18 Texas, 110.

This question was presented in a recent prosecution for bigamy in England, and the court expounded the rule of law as above indicated, in perspicuous language as follows : “ In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he (or she) was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way.” *Regina v. Lumley*, L. R. 1 C. C. 196 (decided in 1869).

The court instructed the jury that the State must prove the existence of the lawful wife at the date of the second marriage, but that, when the issue is upon the life or death of a person, as in the case at bar, if such person is once shown to be living, the presumption of life will continue for a period of seven years, and the burden of proof will lie on the party who asserts the death of such person. It is at least a question if our statute does not alter the old rule of the common law, and reduce the presumption as to continued life from seven to five years. Code Cr. Proc., art. 325. Be that as it may, this charge is erroneous in that it invaded the province of the jury and supplied them with

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an artificial rule to aid their determination, which rule was not applicable; and because the burden of proof does not shift in such cases, but remains on the State throughout to establish, beyond a reasonable doubt, the allegation in the indictment that the lawful wife was in fact alive at the date of the second marriage.

The certificate of the county clerk of Dallas County was inadmissible under any rule of law with which we are familiar. Proof of the non-issuance of the license, or the non-existence of its record, should be made to appear in some one of the modes authorized by law.

The judgment is reversed and the cause remanded.

Reversed and remanded.

MANLY TURNER v. THE STATE.

1. LOST INDICTMENT — SUBSTITUTION. — To supply by substitution the loss of an indictment, the record of the court must not only show the suggestion of loss and the leave to substitute, but also that the substitution has in fact been made. Presumptions cannot be indulged to verify the substituted indictment; but the record-entries may be amended *nunc pro tunc*, even at a subsequent term.
2. THEFT — ALLEGATION AND PROOF OF OWNERSHIP. — Indictment for theft of cattle alleged the ownership to be in one F., who testified that the animals, though the property of his sister, were, when taken, in his possession and care, and under his control, with full authority to sell them, and that he held a power of attorney from his sister; but the power of attorney was not produced. *Held*, that the ownership was well alleged to be in F., and his testimony, irrespective of the power of attorney, was admissible in support of the allegation.
8. EVIDENCE. — In a trial for theft of cattle, the proof showed that the animals in question, together with several which belonged to the defendant, were "rounded up" by him in their accustomed range, and that he there sold those which belonged to him, and left the purchaser with the entire herd. *Held*, error to exclude evidence offered by the defendant that when he sold his cattle he told the purchaser to turn the others out of the herd, and, to assist the purchaser in separating the cattle, left with him a hired hand who, after defendant's departure, hired to the purchaser and assisted in driving off the entire herd.

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APPEAL from the District Court of Burnet. Tried below before the Hon. W. A. BLACKBURN.

The case is indicated in the opinion of the court. The punishment assessed was two years in the penitentiary.

Makemson & Fisher, W. W. Martin, and Foard & Thompson, for the appellant.

WHITE, P. J. With regard to the substitution of the indictment in this case, it is evident from the proceedings that an effort was made by the county attorney to comply with the statute providing for such substitution. Pasc. Dig., art. 2873. The record contains the following entry, after giving the style and number of the case: "Now, on this tenth day of April, A. D. 1877, comes the county attorney, and suggests the loss of the indictment in this cause, whereupon leave is given by the court to supply the same." Then follows a copy of the proposed substituted indictment, with this accompanying statement, after again giving style and number: "Comes the county attorney of Burnet County, in the above styled and numbered cause, and says that the above and foregoing substituted indictment is substantially the same as the original indictment in this cause, which has been mislaid."

If it be admitted, in view of the previous decisions of our courts, that the foregoing is in substantial compliance with the practice in such cases (see *The State v. Adams*, 17 Texas, 232; *Graham v. The State*, 43 Texas, 550; and *Clampitt v. The State*, 3 Texas Ct. App. 638), so far as the suggestion of loss and leave to substitute is concerned, the further question suggests itself upon the record, has the indictment been in fact substituted?

In order to complete the act of substitution, the court should have gone further, and made the record speak the fact affirmatively that the substitution as proposed was made. We are left to indulge the presumption that such

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was the case, but presumptions cannot be indulged in so important a matter as the fact that an indictment really exists; for without an indictment no person in this State can be held to answer to a charge of felony. Const., Bill of Rights, sect. 1; Paso. Dig., art. 2859. Nor are we inclined to extend the authority to substitute indictments beyond the plain and legitimate construction warranted by the statute. Record evidence of the fact that the substitution has been made in compliance with the statute, must be shown, so that the record itself will speak, as it always should, the existence of every matter necessary to its entirety and verity. *Croswell v. Byrnes*, 9 Johns. 286.

The indictment in this case has not been substituted, because there is no order of record showing that fact; and we might content ourselves with reversing the case simply upon that ground (*Beardall v. The State*, 4 Texas Ct. App. 631), but, inasmuch as the record may be amended *nunc pro tunc* (*Rhodes v. The State*, 29 Texas, 188), we will notice, with a view to another trial, some of the many errors complained of in the assignment of errors, and argued at length in the brief of counsel for appellant, premising that such as are not specially noticed are considered by us as untenable.

Perhaps it may be well enough to remark, in passing, that the evidence establishes on the part of Fowler the actual care, management, and control, with authority to dispose of and sell the cattle, and shows such possession and ownership as would sustain the allegation that the property was his; and we consider the fact of the existence or non-existence of the power of attorney, and its introduction as proof of authority, wholly immaterial in view of the other facts proven.

The court erred in refusing to admit the testimony of Isham Good as to what transpired at the time of the sale of the cattle by defendant to Ballard. The bill of sale which defendant executed to Ballard shows that defendant

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sold only fourteen head of cattle, and it is not controverted or denied that these cattle belonged to defendant and his father, and that defendant had authority to sell them. Defendant proposed to prove by Good that at the time he made the sale to Ballard he told Ballard to turn out the cattle that he had not sold him (and some of which are the cattle alleged to have been stolen), and that defendant left his hired hand, Green Turner, to aid Ballard in cutting out or separating the cattle sold from those belonging to other parties. Up to this time there is no evidence going to establish a criminal intent on the part of defendant, except the fact that the animals alleged to have been stolen were "rounded up" and in the herd driven to the place, within the limits of their accustomed range, where the sale and purchase was effected. What was said and done at the time of sale by defendant, with regard to the cattle alleged to have been stolen, was part and parcel of the transaction,—was *res gestæ*, and admissible as evidence. *Bawcom v. The State*, 41 Texas, 159; *Davis v. The State*, 3 Texas Ct. App. 91; *Williams v. The State*, 4 Texas Ct. App. 5. And so with regard to the other fact proposed to be proven by the witness Good, viz., that after defendant had left Green Turner at the herd to assist Ballard in separating the cattle, Green Turner hired to Ballard to aid him in driving his cattle to Hays County. Defendant was entitled to this evidence to show that though Green Turner was in his employ at the time of sale, he had hired afterwards to Ballard, and that in driving the cattle to Hays County, Green Turner was not his agent or hired hand, but was the employee of Ballard, and acting under his directions and instructions, and not under those of his former employer, the defendant.

The court also erred in refusing to charge the jury, as requested by defendant, upon the law of driving live-stock from its accustomed range under circumstances not constituting theft. The indictment in the case and the facts

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established in evidence made such instructions appropriate as part of the law of the case. Pasc. Dig., art. 2410c; *Counts v. The State*, 37 Texas, 594; *Bawcom v. The State*, 41 Texas, 189; *Campbell v. The State*, 42 Texas, 591; *Marshall v. The State*, 4 Texas Ct. App. 549; *Powell v. The State*, ante, p. 467.

The judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

 PATRICK DUNN v. THE STATE.

1. **CHANGE OF VENUE.** — Art. 583 of the Revised Code of Criminal Procedure enacts that "the credibility of the persons making affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person, and the issue thus formed shall be tried and determined by the judge, and the application granted or refused, as the law and the facts shall warrant." This is a new provision, and supplements the preëxisting law on the subject of change of venue at the instance of defendants, reënacted in the preceding art. 578, which empowers a defendant to tender to the State the issue whether there is such prejudice against him in the county as would deprive him of a fair trial, and submits that issue to the determination of the court, but prescribes no rule or means for the guidance of the court in determining it. Art. 583 provides these means, and enables the prosecution, by the affidavit of a credible person, to attack the credibility or the means of knowledge of the persons who made the affidavit in support of the defendant's application. The attacking affidavit may be made by the attorney for the State.
2. **SAME.** — In determining the issue thus presented, the court may not only investigate the general reputation for veracity of the supporting affiants, but also their interest, feelings, relation to the defendant, and like motives, as well as their means of knowledge. A truthful man is not always a "credible person" in a matter involving his information, interests, or feelings.
3. **JURY LAW.** — Chap. 1 of Title LVII. of the Revised Statutes, which prescribes the qualifications of jurors, exemptions from jury-service, etc., is a revision and reënactment of corresponding provisions of the jury law of 1876, and, when not otherwise provided, applies in criminal as well as in civil trials.
4. **SAME — CHALLENGE FOR CAUSE.** — By art. 3012, included in said chapter,

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a juror is disqualified in a case if he has served as a petit juror "in a former trial of the same case, or of another case involving the same questions of fact." This is applicable in criminal cases, and it was error to overrule a defendant's challenge and force upon him a juror who had served as a petit juror in the trial of a party separately indicted and tried as a *particeps criminis* in the same offence charged against the defendant on trial.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The indictment and conviction were for assault with intent to murder, and five years in the penitentiary the punishment assessed and adjudged. As the opinion states all necessary matters of fact, there is no occasion to detail the evidence.

McCampbell & Givens, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The most important question presented for revision in this case is that set forth in defendant's fourth error assigned, and in his fourth bill of exceptions to the rulings of the court. By the bill of exceptions it is shown that the defendant applied to the court for a change of venue, based on the first ground for change of venue set out in art. 578 of the Code of Procedure: "That there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial."

That the application is based upon this ground is apparent by the motion for change of venue, and as cause therefor the following statement will be found appended to the motion: "And this defendant upon oath says that there exists in this county, wherein said cause and prosecution is commenced, so great a prejudice against him that he cannot obtain a fair and impartial trial." The motion is sworn to, and is accompanied by an affidavit sworn to and subscribed by eight persons, which affidavit is as follows: "And now

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in the above numbered and entitled cause come the undersigned citizens and residents of Nueces County in the State of Texas, and on our oath do say, and each for himself says, that there exists in the county of Nueces, where this prosecution against defendant is commenced, so great a prejudice against the said defendant, Patrick Dunn, that he cannot obtain a fair and impartial trial."

The motion for a change of venue made by the defendant was resisted by the district attorney, who filed an affidavit in writing, in which he "denies each and all of the matters and things set out and contained in the defendant's application for a change of venue in this behalf, filed herein on the nineteenth day of November, A. D. 1879, and that he knows of his own personal knowledge that defendant can obtain a fair and impartial trial of said cause in this county of Nueces, and that there is no such prejudice against him as would at all prevent such fair and impartial trial; and that the persons whose affidavits are annexed to defendant's said application for a change of venue herein have not sufficient means of knowledge to support the allegation set out in their said affidavits; that said affiants, to wit, William Cody, James Cody, and William Cody, Jr., are nearly related by consanguinity to one Mathew Cody, who is indicted in this court for being *particeps criminis* to the identical offence with which defendant is charged in this cause; and that the said affiant Thomas Gallagher stated, after signing the same, that he was compelled to do so; and that the other affiants, according to this affiant's information and belief, are in sympathy with and more or less interested with the defendant in this cause." And the district attorney prayed the court to inquire into the truth and sufficiency of the defendant's application for change of venue, and, after a full hearing of the same, that it be in all things denied, and the case proceed to trial in the county where it was then pending.

The district attorney also filed, in support of his resist-

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ance to the motion, an affidavit made by some twenty persons, to the effect following: "And now in the above numbered and entitled cause come the undersigned citizens and credible persons, residents in Nueces County, State of Texas, each in his own proper person, and upon their oath do say, and each for himself says, that there exists no prejudice in this said county such as would at all prevent this defendant from obtaining a fair and impartial trial in said county, where this said prosecution is now pending, and that he can obtain in this said county a fair and impartial trial of this cause."

At this stage of the proceeding the defendant excepted to the sufficiency of the affidavits filed against the application for a change of venue, on the following grounds: "1. That the affidavit upon which it is sought to make an issue is made by the district attorney, who is not a resident of this county; that said district attorney was never in this county until a short time before the commencement of this term of the court; that he knows nothing of the general sentiment or feeling of the people of the county, and he has no means of knowing of the existence of the prejudice complained of; and that he is not a disinterested witness, and in the nature of his office is not a proper person to make said affidavit. 2. And this defendant shows that all the other affidavits are irrelevant and immaterial, and that no issue can be formed on said affidavits in accordance with art. 583 of the Code of Criminal Procedure; and further, that said affidavits are not authorized by law." And he prayed the court that the affidavits be stricken out. The court overruled these exceptions, and refused to strike out the affidavits; and the ruling was saved by the bill of exceptions. And the court proceeded to hear evidence both for and against the motion for a change of venue, and thereupon overruled the motion for a change of venue; and to the ruling the defendant reserved a bill of exceptions.

This bill of exceptions presents two questions: *first*, as

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to the correctness of the ruling of the court in overruling the exceptions of the defendant to the affidavits offered in opposition to the motion for change of venue; and *secondly*, the correctness or otherwise of the action of the court in overruling the motion for change of venue. The solution of the first question depends upon a proper construction and application of art. 583 of the Code of Criminal Procedure, which is as follows: "The credibility of the persons making affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person, and the issue thus formed shall be tried and determined by the judge, and the application granted or refused as the law and the facts shall warrant."

This article is of recent enactment, and is in effect an amendment of, or in addition to, what had before its enactment been provided on the subject of change of venue when asked by the defendant in a criminal prosecution. The only law, before the article under consideration was provided, on the subject of change of venue by the defendant, is found reenacted in art. 578 of the Code of Criminal Procedure.

Now by reading the former law with and considering it in connection with the recent enactment, to our minds the intent of the Legislature in the enactment of the later article is apparent. Whilst it is provided in art. 578 that a change of venue may be granted on the written application of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the two causes mentioned in the article, — and there are but two causes on account of which a change of venue will be granted on the application of a defendant, — it directs that the court shall determine the *truth and sufficiency* of the cause set out in the defendant's application, but prescribes no definite rule by which the court shall be guided in determining the truth and sufficiency of the defendant's applica-

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tion ; and this defect in art. 578, in our opinion, the Legislature intended to supply by the enactment of art. 583.

To our mind, art. 583 was intended to and does provide for the formation of an issue to be tried by the court on the application, in that it authorizes the State, on affidavit of a credible person, to attack the credibility of the persons making affidavit for change of venue, or their means of knowledge. In other words, the issue tendered the State by the defendant in his application may be accepted by the State, by proposing to show to the court either one of two things, — that the persons who made the affidavit were not credible persons, or that they did not possess the necessary means of knowledge as to the facts to which they had deposed ; and these means are provided for in the later article of the Code. It is not provided in this article that an issue is to be formed as to the truth and sufficiency of the application, nor indeed was it necessary, as art. 578 provided for that by requiring the judge to judge of them ; but if it is intended to make an issue as to the credibility of the persons, or the means of knowledge of those who swear for the change of venue, then, by art. 583, this may be done by attacking either by the affidavit of a credible person.

With regard to the present case, we are of opinion that the affidavit of the district attorney put in issue both the truth and sufficiency of the application, and as well the credibility of the persons who made the affidavit for a change of venue, or their means of knowledge ; that it was competent for the district attorney to make the affidavit ; and that the court did not err in overruling the exceptions of the defendant on either ground of exception. The question, the issue before the court, under the pleadings, was prejudice or not, and whether the persons who made the affidavits in support of the motion were credible persons, and in possession of sufficient means of knowledge to make the affidavit. In determining as to the credibility and means of knowledge of the supporting affiants, and in

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hearing testimony on the issue formed, the court was governed by the general rule of evidence, and was authorized to inquire not merely as to whether the affiants had sworn or were likely to swear falsely, but also into their motives, intent, and feelings, relationship to the party, and the like, and their opportunities and means of knowledge as to the matter to which they testified, in order that the court could determine the very truth as to the facts under investigation. A person may be a truthful man in the ordinary acceptation of the term, and still not be a credible person in matters of this nature, involving information, feelings, prejudice, and the like.

The testimony on which the judge acted in refusing to change the venue is set out in the bill of exceptions. The most that can be said of it in favor of the defendant is that the evidence is conflicting. We cannot say that the evidence was so unsatisfactory as that the action of the court was clearly wrong, and to the prejudice of the defendant's right to a fair and impartial trial.

There are other questions of importance to the rights of the appellant as well as of interest to the public. On the trial below, and whilst the jury was being formed, the defendant challenged for cause several jurors who had served for six days in the District Court during the six months next preceding the term of the court then sitting, and the challenge was overruled. These persons, it seems, were peremptorily challenged, so that they did not sit on the case, except one Hickey, who sat on the trial, when it is shown that he had sat on the trial of one Mat Cody, who was an indicted *particeps criminis* in the offence charged against the defendant, and involving the same facts. The judge, in giving a bill of exceptions, says these jurors were in all respects qualified under the requirements of the Code of Criminal Procedure. The causes of challenge as laid down in the Code of Criminal Procedure are not in all respects identical with those in the Revised Statutes at Large.

By the Code of Criminal Procedure, art. 636, it is pro-

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vided, among other things, that a challenge for cause may be made on the reason that the proffered juror has "served on a petit jury in a former trial of the same case." By art. 3012, Revised Statutes, among the persons named as being disqualified to serve as petit jurors in any particular case is, "Any person who has sat as a petit juror in a former trial of the same case, or of another case involving the same questions of fact." These two clauses are susceptible of being construed together, so that both may stand. To our mind, the articles of the Revised Statutes, chap. 1 of Title LVII., relate to, and are but a revision of, the jury law of 1876, in the main, and, unless otherwise provided, relate to the formation, qualification, and exemption as well in criminal as in civil trials. This is the plain import of the law, and it would be a monstrous interpretation to hold that a juror would be incompetent in a civil suit, involving, it may be, a paltry sum, and competent when liberty or life is involved. The juror Hickey was not a competent juror under the law, and the defendant should not have been forced to try before him, under the circumstances set out in the bill of exceptions, and the challenge for cause should have prevailed.

The sufficiency of the indictment is called in question by a motion in arrest of judgment as well as by preliminary exceptions. It is not necessary to say more than that, under repeated rulings of both the Supreme Court and this court, the indictment is sufficient both as to form and substance.

Other questions are presented by the record, but have not been passed on, for the reason that they may not arise on another trial. For the error committed in the formation of the jury, the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

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MARY MOORE v. THE STATE.

1. PLEADING. — Issuable allegations in an indictment should be directly and certainly averred, and not be introduced by way of argument or inference.
2. UNLAWFUL MARRIAGE. — In a prosecution against a white person, under art. 2016, Paschal's Digest, for knowingly marrying a negro within this State, or for cohabiting with a negro within this State, after an intermarriage in or out of this State, the marriage was an essential constituent of the offence, and it should have been directly averred in the indictment and positively established by the proof. Cohabitation, without a previous marriage, was not within the said article.
3. SAME — EVIDENCE. — In the trial of a woman for unlawful marriage with a negro, whether or not she was a white woman was an issue to be affirmatively established by the State. A witness's opinion that "she looks like a white woman" does not suffice to prove it.

APPEAL from the District Court of Marion. Tried below before the Hon. B. T. ESTES.

The charging part of the indictment alleged that "Mary Moore, late of said county, on the 1st day of September, A. D. 1878, and in said county of Marion and State of Texas, did then and there unlawfully, knowingly, and feloniously continue, in the State of Texas and in Marion County, to cohabit with a negro, to wit, one Henry Moore, she, the said Mary Moore, having married him, the said Henry Moore, a negro as aforesaid, and she, the said Mary Moore, being then and there a white person;" contrary to law, etc.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. It is an old principle in our law of criminal pleading that an indictment should allege the facts by averments direct, positive, and certain, and not by way of argument and inference. The facts constituting the crime must be introduced upon the record by averments in opposition to argument and inference. *Bush v. The Republic*, 1 Texas,

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455. Tested by this principle, we are of opinion that the indictment in this case does not come up to the required standard, and must be held too defective to sustain a conviction.

In a prosecution against a white person for having knowingly intermarried with a negro, or for continuing to cohabit with such negro, within this State, after an intermarriage either in or out of this State, the fact of marriage is an essential ingredient, and must be positively averred and proved. Pasc. Dig., art. 2016. A mere cohabitation within this State, without a previous intermarriage, does not bring the offence within the statute which was in force at the time of the alleged offence, and upon which the prosecution is based. The indictment should have averred that the defendant, being a white person, did knowingly intermarry with the negro without this State, and did thereafter remove to this State and continue to cohabit with such negro within this State; or if the marriage was consummated within this State, that fact should have been alleged, with the further allegation of continued cohabitation, if the pleader designed the latter as the basis of prosecution.

While some irregularity is apparent in the proper authentication of the statement of facts, it is sufficiently authenticated by the signature of the judge to authorize its consideration as a part of the record in the cause. *Bowden v. The State*, 2 Texas Ct. App. 56.

The evidence disclosed therein is not sufficient to support a conviction, and a new trial should have been awarded. Apart from the unsatisfactory character of the evidence relating to the marriage, it does not appear with any degree of certainty that the defendant was a white woman. This was an essential fact, perhaps the most essential to be established by the prosecution. To permit a female, however lowly her condition or vicious her associations may be, to suffer imprisonment in the penitentiary for two years, upon the opinion of a single witness "that she looks like a white

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woman," would be an outrage upon law and justice, which courts cannot tolerate.

The judgment is reversed and the cause remanded.

Reversed and remanded.

J. HANNAHAN v. THE STATE.

1. **CHARGE OF THE COURT.**—In responding to a request for further instructions, the judge must limit his instruction to the particular matter indicated by the jury.
2. **SAME — ACCOMPLICE TESTIMONY.**—The jury having asked whether they could convict if they believed a principal witness for the State was a *particeps criminis*, the court instructed them that they could if the proof, in itself or in connection with other evidence, established the allegations of the indictment, "and if there are any other facts and circumstances which you have found from the testimony to be true, and which tend to connect the defendant with the commission of the offence, other than the mere fact of its commission," and supplemented the instruction with the criteria usually applied to testimony in general. *Held*, that the instruction is not limited to the question put by the jury, and, as a response to it, is inadequate and misleading.

APPEAL from the District Court of Uvalde. Tried below before the Hon. T. M. PASCHAL.

The trial was for theft of a cow. Frank West and other witnesses for the State testified that the appellant killed the animal and disposed of the beef. Two witnesses for the defence testified that she was killed and disposed of by Frank West, and that the appellant, though present, had nothing to do with it.

Teal & Dial, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. We deem it unnecessary to notice but one matter presented by the record, as the others are not likely

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to arise on another trial. After the trial had been concluded, and the jury had retired to consider of their verdict, they returned into court and asked additional instructions, indicating the matter upon which they wished to be informed by the following question propounded to the judge: "I and three other jurymen would like to know whether we can convict if we fully believe that Frank West is one of the party concerned in the killing of this animal alleged to be stolen by John Hannahan; we are not willing to discard one part of the evidence unless all, and we cannot agree on this point." The question is in writing, and signed by one of the jurymen.

On the question being presented to the judge, he gave the jury the following additional charge, to wit: "The jury are instructed that you can convict on the testimony of any person whom you believe to be a party concerned in the stealing of an animal charged to be stolen, provided, *first*, the evidence is sufficient in itself, or in connection with other evidence, to prove the allegations in the indictment, and which are simply recapitulated in sect. 2 of the charge of the court; and, *second*, if there are any other facts and circumstances which you have found from the testimony to be true, and which tend to connect the defendant with the commission of the offence, other than the mere fact of its commission, you are further instructed, in reply to your second inquiry, that if you cannot harmonize or reconcile the conflict in the testimony, you may accept or reject the testimony of any witness, in whole or in part, just as it may appear to you to be worthy of credit and belief. This is your peculiar province, to weigh evidence and judge of the credibility of witnesses. To this end you must exercise your common sense, your knowledge of human nature in general and of the witnesses in particular. Their manner of testifying, apparent freedom from bias or prejudice, sources and opportunities of knowledge which they possess,—all these are legitimate criteria to guide you

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in passing intelligibly on what weight or credit you will give to the testimony of the witnesses.”

The act of the jury in appearing in court and asking further instructions was warranted by art. 696 of the Code of Criminal Procedure, and by the same article the judge is required to give the instruction in writing; but the judge is required to confine his additional charge to the question asked by the jury, and it is expressly provided that “no instruction shall be given except upon the particular point on which it is asked.” Code Cr. Proc., art. 697.

We are of opinion that the judge enlarged upon the question to an extent not warranted by the law and not called for by the interrogatory propounded by the jury; and further that, even if allowed under the circumstances, the charge does not state the law of the question correctly, nor in a manner not liable to be construed by the jury, though doubtless not so intended, to permit the jury to convict the defendant on the uncorroborated testimony of a witness who they might be fully satisfied from the evidence was a guilty participant in the offence for which he was being tried, and to permit the jury arbitrarily to credit or discredit the testimony of the witnesses or any of them, and without reference to the well-established facts in evidence, and their oaths, which required them to decide the case according to the law and the testimony adduced on the trial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN BAKER v. THE STATE.

1. EVIDENCE — PRACTICE. — In the separate trial of a defendant jointly indicted with others for an assault with intent to murder, the principal State's witness testified to the acts and declarations of one of the others in bringing about the conflict, before the defendant on trial came upon the ground. A motion of the defence to exclude this evidence was overruled by the court.

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Held, not error, inasmuch as ample evidence was afterwards adduced of a conspiracy and concert of action between all the indicted parties to bring on the conflict.

2. CHARGE OF THE COURT — PRACTICE. — After the judge had read his charge to the jury, but before they retired to consider of their verdict, he corrected that portion of it which stated the number of years which would bar prosecution for the offence. *Held*, not error, as no prejudice to appellant is apparent, and the correction was made before the retirement of the jury.

APPEAL from the District Court of Johnson. Tried below before the Hon. J. ABBOTT.

The case is substantially stated in the opinion.

McCall & McCall and *F. A. Fisher*, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. A motion was made to exclude that portion of the testimony of the principal State's witness which related to the acts and declarations of the co-defendant Braziel in the absence of and before this appellant appeared upon the scene of difficulty; which motion was overruled by the court, and the ruling duly reserved by defendant's first bill of exceptions.

In *The People v. Brotherton*, 47 Cal. 388, the court hold that where two are jointly indicted the prosecution may on the trial prove the declarations and acts of one done in the absence of the other, before proving the conspiracy between the defendants, provided proof of such conspiracy is afterwards made.

In the case of *The State v. Winner*, 17 Kan. 298, the rule declared is, that in any case where such acts and declarations are introduced in evidence, and the whole evidence on the trial, taken together, shows that a conspiracy actually existed, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations.

The rule enunciated in *The People v. Geiger*, 49 Cal.

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643, is that, "the conspiracy to commit a crime being proved on the separate trial of one of the conspirators, the jury are to give the same weight to the declarations of the conspirator not on trial as they would give them if made by the one on trial." See also *The People v. Cotta*, 49 Cal. 166.

Mr. Greenleaf says: "It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." 1 Greenl. on Ev., sect. 111.

In this case the evidence shows that some of the indicted parties had had a previous difficulty with Walraven, and that defendant and the others determined to go up and have a settlement of it with him at the time of the transaction which gave rise to this prosecution. Braziel reached the scene of action first, and had renewed the difficulty when defendant and the other party charged jointly with the offence arrived upon the ground and immediately took part in it. The evidence clearly shows that all were acting in concert, and this appellant and Watson, the other co-defendant, by immediately taking part with Braziel, adopted the acts and declarations which he had previously made and committed in pursuance of their plan to settle the difficulty, and rendered themselves directly liable and responsible for the same as though they had been personally present at the time they were made and committed. The court, therefore, did not err in refusing to exclude these acts and declarations.

In the particular portion pointed out and subjected to criticism by counsel in their brief filed in the case, the charge of the court does not appear to us liable to the objections urged. When subjected to a critical analysis, the supposed objectionable portions are not in conflict, but fully

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accord with the well-established statutory provision that "though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provoked a contest with the apparent intention of killing or doing serious bodily injury to the deceased, the offence does not come within the definition of manslaughter." Pasc. Dig., art. 2260.

Another objection urged is that the court did not give defendant the benefit of a charge upon aggravated assault. In our opinion, such a charge was not called for by the evidence, so far as the defendants were concerned. They went to the house of the injured party and renewed the difficulty. This defendant found the parties engaged in a war of words when he came up, and, immediately dismounting from his horse, dared the assaulted party to come out of the yard. As the latter started out of the yard, his pistol fired off in his pocket, when one of the assailants fired upon him and shot him through the wrist. Two of them seized him and threw him down upon the ground, and took his pistol from him, this defendant telling them, "D—n him, shoot him, now you have got his pistol." Defendant was perfectly willing and anxious to see the other two, who had an unarmed and wounded antagonist down and disabled, shoot him with his own pistol, and thus end the affray by taking his life; and when other parties interfered and released the wounded man, and were bearing him away from the conflict to the house, this defendant, who had throughout been encouraging the others by acts and words, manfully fires his pistol at or towards the retreating enemy, for the purpose of bluffing him, as the witness supposed.

A bill of exceptions was saved to the action of the court in altering a portion of the charge after it had been read to the jury. The portion altered was in regard to the limitation in offences of this character. It seems that the court had written "five" instead of "three" years as the time within which the offence must have been prosecuted

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(Pasc. Dig., art. 2652), and altered the words so as to conform to the law. We do not see how the defendant could have possibly been prejudiced, and moreover the bill of exceptions does not show that the alteration was made after the jury had retired from the court-room to consider of their verdict.

There is no such error in the record as would warrant us in reversing the judgment, and it is therefore affirmed.

Affirmed.

L. SCHOTT v. THE STATE.

1. **INFORMATIONS — FILE-MARK.** — If an information and its supporting affidavit be attached to each other, or if both be written on the same sheet of paper, and the clerk's file-mark be put upon the outside fold, it is a substantial compliance with the statutory requirement that the affidavit "shall be filed with the information."
2. **SAME — PRACTICE.** — Objection that the affidavit was not filed must be taken *in limine*; when primarily raised by motion in arrest of judgment, it is not available.
3. **ROAD-LAW.** — Overseers of first-class public roads are not only authorized, but it is their legal duty, under penalty for its neglect, to remove from the roadway any fence or other obstruction.
4. **SAME.** — Being prosecuted for pulling down another's fence without the owner's consent, the defendant proposed to prove that he was the overseer of a certain first-class public road, and in the discharge of his duty removed the fence, which had been placed in the roadway. *Held*, error to exclude the evidence.

APPEAL from the County Court of Fayette. Tried below before the Hon. J. C. STIEHL, County Judge.

Timmons & Brown, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. The prosecution in this case was by information charging appellant with a violation of the first sec-

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tion of the act of April 23, 1873 (Gen. Laws 13th Leg., p. 41), which provides that "it shall be unlawful for any person or persons to break, pull down, or injure the fence or fences of another, without the consent of the owner or person in possession thereof."

The objection urged to the affidavit and the information in the motion to arrest the judgment is that the former was not "filed." The statute is, the "information shall be based upon the affidavit of some credible person, which shall be filed with the information." Acts 1876, p. 20, sect. 8. If such defect really existed, advantage should have been taken of it by exception *in limine*, and it cannot be reached for the first time by motion in arrest. We are of opinion, however, that the objection is wholly untenable; the law, so far as appears, having been substantially complied with by the filing of the information which is based upon the affidavit. For aught that appears, the complaint and information may have been fastened together, as is frequently done, or been written upon the same sheet of paper; in either of which cases it would be unnecessary that the clerk should indorse more than one file-mark, and that upon the paper which happened to be on the outside.

Defendant in this case was overseer of a first-class public road in Fayette County. One Nitsche had moved his fence out into and erected it along the road, so as to reduce the width of the road to twenty-seven feet. Defendant, in working his road as overseer, made his hands take up and remove the fence back to the line it previously stood upon, and which made his road just forty feet wide, the width which the statute prescribes for first-class roads. See Road Law, Acts 1876, p. 63, sect. 2.

On the trial, defendant proposed to prove these facts by several witnesses, and the evidence was excluded by the court, as is shown by the bill of exceptions.

Amongst other special instructions asked in behalf of defendant, and refused by the court, we select the following:—

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“ 1. That a first-class road is by law forty feet wide. 2. That under the law it is the duty of the overseer of a road to keep it clear of obstructions for forty feet. 3. That if the defendant was the overseer of the road, and as such only caused the fence to be removed in so far as it obstructed said road, or reduced it to less than forty feet in width, then he is guilty of no offence, and you should acquit him.”

The court erred both in excluding the evidence set out in the bill of exceptions and in refusing to give the special charges asked. As stated above, the statute prescribes that all first-class roads shall not be less than forty feet wide. Acts 1876, p. 63, sect. 2. By sect. 24 of the Road Act of 1876 (Gen. Laws 15th Leg., p. 68) it is provided that “if any overseer of a road shall fail, neglect, or refuse to perform the duties as prescribed by this act, or if he should not keep the roads, bridges, and causeways within his precinct clear and in good order, or if he suffer them to remain uncleared and out of repair for twenty days at any one time, * * * such overseer shall be deemed guilty of a misdemeanor, and on conviction thereof by any court of the county, of competent jurisdiction, he shall be fined not less than ten nor more than twenty-five dollars.”

By moving his fence out and erecting it in the public road, and thereby lessening the width of said road, Nitsche, the party alleged to have been injured, was himself guilty of a violation of law, and was liable to be punished by fine not to exceed \$500. Pasc. Dig., art. 2034; Rev. Penal Code, art. 405. Moreover, he was further liable for creating a nuisance, for it is in law a nuisance to obstruct a highway. *Columbus v. Jaques*, 30 Ga. 506; *Gerrish v. Brown*, 51 Me. 256; *Merton v. Moore*, 15 Gray, 573; *The State v. Spainhour*, 2 Dev. & B. 547; *The State v. Mobly*, 1 McMull. 44; *The State v. Atchison*, 24 Vt. 448; *Dimmitt v. Eskridge*, 6 Munf. 308.

Mr. Angell, in his work on Highways, says: “To destroy, stop up, or divert the course of an ancient highway is a nuisance at common law; nor is it less a nuisance though a

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new and ~~better~~ way be substituted in its place. Such a change can only ~~be~~ made under the king's license, obtained upon a writ of *ad quod clamnum* or in the mode provided by statute. Where, therefore, ~~the~~ change has been made without due authority, the public may ~~at~~ any time return to the old path and remove any obstruction ~~there~~, or indict the person who caused or continued such obstruction; ~~and~~ it is immaterial how long it has been shut up or disused." Sect. 224.

It was peculiarly within the province and the duty of the road overseer to remove any obstruction or nuisance which might be placed in it. More than a duty: he rendered himself directly liable to be punished if he failed to remove the obstruction, as we have seen, under the statute above quoted. If the fence was not an obstruction to the highway, then the overseer would have no more right to remove or interfere with it than any other individual, and his doing so would be a violation of the statute under which this prosecution was conducted. This was the issue sought to be met by the evidence which was excluded, and was the main question to be solved, and which in this case called expressly for the special instructions, or ones similar to those, refused by the court.

The judgment is reversed, and cause remanded for a new trial.

Reversed and remanded.

SAMUEL BROWN v. THE STATE.

1. BURGLARY. — INDICTMENT for burglary must allege that the entry was effected by force, threats, or fraud, and without the free consent of the occupant, or of some one authorized to give such consent. Averment that the entry was "with force and arms" does not supply these allegations; nor, under the Code of this State, are those words necessary in the indictment.

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2. **SAME.** — Indictment for burglary must set forth with certainty the offence with intent to commit which the burglarious entry was effected.
8. **SPECIAL PLEA — VERDICT.** — When the accused has specially pleaded former conviction or acquittal, as well as not guilty, the verdict must expressly find whether the special plea is true or untrue.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The opinion states the matters relevant to the rulings. No statement of facts appears in the record. The appellant pleaded former conviction, but the verdict ignored the plea.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. The sufficiency of the indictment in matter of substance, or whether or not its defects were cured by the amendment properly admitted to be made at the trial, is called in question by the preliminary exceptions which were overruled, as well as by the defendant's motion in arrest of judgment, which was also overruled. The charging part of the indictment is in this language: "That one Samuel Brown, late of said county, on or about the fourth day of October, A. D. 1879, about the hour of twelve o'clock in the night-time of the same day, with force and arms, at Corpus Christi in the county of Nueces and State of Texas, the dwelling-house of one Ellen Vandervoort, there situate, did break and enter, with intent her, the said Ellen Vandervoort, violently and without her consent, then and there feloniously to rape and carnally know; contrary," etc.

The offence here charged is that of burglary, which, as defined in art. 704 of the Penal Code, "is constituted by entering a house by force, threats, or fraud, at night, * * * with intent * * * of committing felony, or the crime of theft." The felony which the defendant is

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charged to have intended to commit is rape, which, defined in art. 528 of the Penal Code, “is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud.” These extracts from the Code are sufficient for our purpose, in order to determine the question as to the sufficiency of the charge as set out in the indictment. The offence with intent to commit which the indictment charges the burglary to have been committed is a felony. The precise question to be determined is this: Does the indictment sufficiently charge the offence of rape?

It need hardly be stated in this connection that burglary with us is a statutory offence, or that in such case it will ordinarily be sufficient to describe an offence in the language of the statute which creates the offence; or that, whilst this is the general rule, it has its recognized exceptions. The exceptions, on examination, will be found to require greater rather than less particularity than the statutory definition.

Mr. Bishop, treating of the meaning of words employed in an indictment, and the elements of the offence, says: “Except where technical phrases are used, its terms and expressions are to be understood in the common and popular sense, or at least according to their plain and natural import. And while it should set out all the matter which by law enters into the offence, it need contain nothing more. Suppose a crime is made more highly penal when committed on a person of a particular class than on others, the indictment need not necessarily specify the class; yet if it does not, only the lower degree of punishment can be inflicted.”
1 Bishop’s Cr. Proc., sect. 509.

With us the indispensable requisites of an indictment are set out in art. 420 of the Code of Criminal Procedure. One of the requisites is that the offence must be set forth in plain and intelligible words. One defect in the indictment is that in that portion which attempts to set out the breaking and entry of the house it fails to charge that the entry was effected by force, threats, or fraud, and to negative the idea

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that the entry was made with the free consent of the occupant, or of one authorized to give such consent. Penal Code, art. 706. The words "with force and arms," standing in the position they do in the indictment, cannot, we are of opinion, be invoked to supply the deficiency, for the reason that they do not enter into nor form any part of the description of the offence, any more than other mere formal portions of the indictment. These words form no material part of the indictment; they were unnecessary, and were entitled to be treated as mere surplusage. Mr. Bishop classes these words, "with force and arms" as a needless and formal averment. In most of the States these words have been made unnecessary by express statutory provision. 1 Bishop's Cr. Proc., sect. 502. They are not enumerated in the Code as being essential to the validity of an indictment. Code Cr. Proc., art. 420.

We are also of opinion that that portion of the indictment which attempts to set out the intent does not describe the offence in plain and intelligible language, with reference to the statutory definition of rape. In *Simms v. The State*, 2 Texas Ct. App. 110, on the authority of a number of cases there cited, it was said: "It has frequently been held that the felony or crime which the defendant intended to commit must and should be set forth with certainty and particularity in an indictment for burglary." For an indictment held sufficient for burglary with intent to commit rape, see *Burke v. The State*, 5 Texas Ct. App. 74.

Inasmuch as "a motion in arrest of judgment shall be granted upon any ground which would be good upon exception to an indictment or information for any substantial defect therein" (Code Cr. Proc., art. 787), we are of opinion the motion in arrest of judgment should have been sustained. There are other errors complained of in the record, one of which is apparent in that the jury by their verdict did not find whether the defendant's special plea was true or untrue. Code Cr. Proc., arts. 525, 712. The other matters pre-

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sented cannot be properly considered in the absence of a statement of facts, or may not arise on a subsequent trial. For the errors above mentioned, the judgment is reversed, and the cause remanded for such other proceedings as may legally be taken in the premises.

Reversed and remanded.

JAMES MASON v. THE STATE.

1. CHARGE OF THE COURT. — In a trial for conveying into a jail articles useful to aid the escape of prisoners therefrom (Pasc. Dig., art. 1946), the court below gave in charge to the jury art. 1950, Paschal's Digest, which defines and punishes the offence of aiding prisoners to escape from an officer. *Held*, error.
2. EVIDENCE. — A State's witness having testified to a confession of the accused, and having stated that her feelings towards him were unkind, the defence asked her if she had not on that day, and at a place stated, said that the accused was a rascal, and that she wanted to see him go to the penitentiary; to which the court sustained the objection that she had already testified that her feelings were unkind towards the accused. *Held*, error; the question was legitimate to probe the *animus* of the witness, and also to lay the predicate for conflicting proof.

APPEAL from the District Court of Lampasas. Tried below before the Hon. W. A. BLACKBURN.

The opinion sufficiently states the case.

J. C. Matthews and A. G. Walker, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. The indictment in this case is inartistically drawn, but when critically analyzed is sufficient to charge the offence of aiding prisoners confined for felony to escape from jail. Obviously it was the intention of the pleader to frame the indictment so as to meet the provisions of art.

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321 of the Penal Code (Pasc. Dig., art. 1946), which declares that "if any person shall convey into any jail any disguise, instrument, arms, or any other thing useful to aid any prisoner in escaping, with intent to facilitate the escape of a prisoner lawfully detained in such jail on an accusation of felony, or shall in any other manner calculated to effect the object aid in the escape of a prisoner legally confined in jail, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years." Being good under this statute, the court did not err in overruling defendant's motion to quash the indictment.

When the judge came to charge the jury, however, he evidently mistook the offence set forth in the indictment; for, instead of the article (1946) above quoted, he charged the law applicable to a prosecution carried on under art. 325 of the Penal Code (Pasc. Dig., art. 1950), which does not relate to aiding prisoners to escape from jail, but provides for an entirely different substantive offence, — that of aiding prisoners to escape from an officer legally holding them in custody on an accusation for a felony. Apart from the fact that the two statutes, arts. 1946 and 1950, are for two separate and distinct offences, it is further to be noticed that the punishment is not the same. For aiding prisoners to escape from jail (art. 1946), as we have seen, the punishment is not less than two nor more than five years in the penitentiary; whilst the offence of aiding a prisoner to escape from an officer (art. 1950) is punishable by imprisonment in the penitentiary not less than two nor more than seven years.

The instruction of the court to the jury was: "And I give you in charge, as the law applicable to this case, that if any person shall wilfully aid in the escape of a prisoner from the custody of an officer by whom he is legally held in custody on an accusation of a felony, by doing any act calculated to effect that object, he shall be punished by imprisonment in the penitentiary not less than two nor

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more than seven years." This charge is in the very language of art. 1950, and was not the law of the case either in the definition or punishment of the crime charged in the indictment. Of course the failure to give in charge the law applicable to the case necessitates a reversal of the judgment.

In view of a subsequent trial, we call attention to another error committed in excluding the evidence of Mrs. McFarland, as shown by the third bill of exceptions. The question asked the witness was not only pertinent as one discovering the *animus* or feeling of witness towards defendant, but was further appropriate and legitimate as establishing a predicate for the impeachment of the witness with regard to declarations made by her showing hostility to the accused. Defendant was, under the circumstances indicated, entitled to have the witness answer the question set out in the bill of exceptions.

It is unnecessary that we should notice specifically other errors complained of. Such as are errors are not likely to occur on another trial. On account of the errors discussed, the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

W. WALLING v. THE STATE.

1. RAPE. — INDICTMENT alleged that without the consent and against the will of the female named the defendant did "violently and feloniously rape, ravish, and carnally know her." *Held*, sufficient to charge a rape "by force."
2. PRACTICE. — The enforcement of the "rule" for sequestering witnesses is a matter largely confided to the discretion of the judge who presides at the trial; and unless it is shown that his discretion was abused, his action in the matter will not be revised on appeal.

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APPEAL from the District Court of Bell. Tried below before the Hon. L. C. ALEXANDER.

There is no occasion for a detail of the evidence. The appellant was found guilty of rape, and his punishment was assessed at five years in the penitentiary. A motion for a rehearing was made and overruled. The female witness alluded to in the opinion was the lady upon whom the outrage was perpetrated. The youth of the appellant doubtless accounts for the lenity of the jury.

Boyd & Holman and *W. I. Cole*, for the appellant; also *Willie & Cleveland*, on motion for a rehearing.

Thomas Ball, Assistant Attorney-General, for the State.

WINKLER, J. It is contended on the part of the appellant that the indictment does not sufficiently describe the offence charged, in that it does not aver that the carnal knowledge of the woman was obtained in any manner known to the law which defines the offence of rape; in other words, that the indictment does not charge that the carnal knowledge was obtained by force, threats, or fraud. The indictment does not charge threats or fraud; the only question is, does it charge that the carnal knowledge was obtained by force. The indictment does charge that it was done without her consent and against her will, and that he "did then and there violently and feloniously rape, ravish, and carnally know" the female.

We are of opinion that the objection to the indictment is not maintainable. The word "violently," as used in the indictment, is equivalent to the word "forcibly," and supplies its place. But further: the word "ravish," employed in the indictment, is equivalent to the words employed in the Code, as was expressly decided in *Gutierrez v. The State*, 44 Texas, 578, and followed by this court in *Williams v. The State*, 1 Texas Ct. App. 90. See the latter case, and authorities

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there cited. The indictment is sufficient both as to form and substance.

It is shown by a bill of exceptions that during the progress of the trial below the defendant offered to place a witness on the stand to testify against a female witness for the State, as to her character, but was not permitted to do so, for the reason that, whilst the witness had been placed under the rule, the proffered witness had not, but had remained in the court-house during the examination of at least a portion of the witnesses. It is not shown that the witness was an expert. The circumstances under which the court acted are fully set out in the bill of exceptions. Matters of this character are necessarily confided to the discretion of the judge who presides at the trial, and, for aught that is made to appear by the bill of exceptions or otherwise, we are unable to determine that the discretion confided to the judge was abused by him. Several objections are taken to the charge of the court; as to which we need only say that these objections are either untenable, or, if there was error, it enured to the benefit of the defendant.

The judgment is affirmed.

Affirmed.

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D. N. WALKER v. THE STATE.

ASSAULT WITH INTENT TO MURDER. — The accused, while intoxicated and without provocation or known grudge, fired his pistol towards his friend and missed him though but seven or eight feet distant. *Held*, that the material question thus raised was whether the accused fired at the party with the purpose of striking him, or shot in mere bravado; and this issue should have been submitted to the jury directly and distinctly, and not by mere implication. A charge was erroneous which in effect assumed the purpose to strike, and instructed the jury that the law implied malice from the deadly nature of the weapon used.

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APPEAL from the District Court of Johnson. Tried below before the Hon. J. ABBOTT.

The opinion states the material facts.

Poindexter & Bradshaw, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. The material facts developed by the prosecution in this case were briefly and substantially as follows: In June, 1874, the defendant was in a drug-store in the town of Alvarado, Johnson County, in a state of intoxication, and presumably attempting to negotiate with the clerk with a view to procuring more liquor. His friend and partner, George Crump, accompanied by W. L. Combs, came into the store and found defendant standing at or near the counter, with a five-dollar bill in his hand. Upon the entrance of these parties, the defendant asked Combs if he (Combs) thought it right to charge him a per cent on this prescription, — calling his five-dollar bill a prescription for whiskey. Combs replied, “No; but that is money, and not a prescription for whiskey.” The defendant then asked Crump the same question, to which Crump replied that he did not understand him. The defendant replied: “You are a damned fool.” To which Crump replied, “Newt, I am a white man and a gentleman, and don’t want any trouble or difficulty with you.” And to this the defendant rejoined, “No, you are a damned nigger.”

About this time Crump started out of the store, and was some seven or eight feet from the defendant, going toward the door, when the defendant drew a pistol and fired in the direction of Crump. The most disinterested witness for the State testified that the ball must have missed Crump eighteen inches or two feet; and this opinion is based upon the position of the parties, which is specifically described, and the place in the door which the ball entered. Crump,

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however, testified (and he was the only other witness for the State) that the concussion or the bullet shock hurt him very much, and about an hour after the difficulty happened he observed a bruised place on his cheek, which he thought must have been made by the bullet. There was evidence that Crump assisted the other witness in disarming the defendant after the shot was fired. The defendant, being charged for an assault with intent to murder, has been convicted of that offence, and prosecutes an appeal to this court.

The most material inquiry arising upon this state of facts is, Did the defendant shoot at Crump? If he did shoot at him, purposing and intending that the missile should strike his person, then under the law he would be guilty of the offence charged, no matter whether the missile reached and took effect as desired and intended or not, no matter whether at the time the defendant was drunk or sober. This latter remark is based upon the conclusion that the defendant as it appears in the evidence, acted as intended as laying down a rule that in all prosecutions of this character drunkenness must be held as immaterial. But if the shot was not in truth fired at Crump, and if he was not *designed* and *intended* that it should strike him, then the act was perpetrated in a spirit of drunken bravado, and then, no matter how reprehensible the act may have been, nor how much it may be very justly condemned, the defendant ought not to suffer the penalty for an assault with intent to murder, but for some other offence designedly described in our statute laws.

The charge of the court did not submit this decision to the jury, except inferentially, and that so remote that the jury were likely not to perceive it, and most probably they did not perceive it. As it was the very issue upon which the guilt or innocence of the defendant necessarily depended, its importance to him, as well as to a proper administration of the law applicable to this case, cannot be overestimated. The answer to this question solved the case; and it

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have been placed before the jury in so clear a manner that they could not have mistaken it.

Instead of doing this, the court instructed the jury as follows: "When one person shoots at another with a loaded pistol, within carrying distance of such weapon, the same being a deadly weapon, the law presumes the person so shooting intended to kill the person shot at; that is, the law does not require proof that the same was done with malice, but implies or imputes malice to the person so shooting; and if the death of the person shot at is thereby caused, the killing will be with implied malice, and murder of the second degree, unless there are circumstances in proof that will reduce the killing to a degree or grade below murder, or which excuse or justify the act." This charge, as applicable to the case, was erroneous in more than one particular. It assumes that the defendant shot at the alleged injured party, which was the very fact it was devolved upon the jury to find. Starting with this assumption of a most material fact, it then informs the jury that there was no further fact to find, but that the law came in with its presumption and decreed that the person shooting necessarily intended to kill the person shot at. Under this instruction the jury could not well have done otherwise than convict. *Agitone v. The State*, 41 Texas, 501.

Again, the court further instructed the jury as follows: "When an unlawful killing is shown to have been done, it devolves upon the defendant to show facts or circumstances which will reduce or mitigate the offence, or which will excuse or justify the act. Such unlawful killing is on implied malice, and is murder of the second degree." This charge was given in connection with an explanation of murder and the statutory test for assault with intent to murder, which is, Had death ensued, would the offence have been murder? As an abstract exposition of the law it is erroneous, and we cannot say necessarily harmless to the defendant on trial, when taken in connection with other parts of

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the charge. Even when an unlawful killing is so burden is only on a defendant to show excuse, justification or mitigation, when the same does not arise out of evidence against him. *Hall v. The State*, Galveston, 1875; *Perry v. The State*, 44 Texas, 478; *Brown v. The State*, 4 Texas Ct. App. 275; *Ake v. The State*, Ct. App. 398; *Leonard v. The State*, ante, p. 41.

For error in the charge of the court, the judgment reversed and the cause remanded.

Reversed and remanded.

F. McKEEN v. THE STATE.

1. PRINCIPALS — ACCOMPLICES — CHARGE OF THE COURT. — When an indictment for felony charges the defendant as a principal offender under the Code of this State, he may be convicted as an accomplice. It is therefore, in the trial of such an indictment, to give in charge the provision of the Code defining accomplices, as the law requires in the case, instead of the provision defining principal offenders. *The State*, ante, p. 361, cited with approval.
2. ACCOMPLICES under the Code of this State would in most of the cases at common-law be denominated accessories before the fact, but in cases specially excepted, the rules applicable to the latter apply to the former.

APPEAL from the District Court of Wise. Tried before the Hon. A. J. HOOD.

This is part and parcel of the same copartnership transaction involved in the case of *Scales v. The State*, ante, p. 361. The opinion gives a clear though brief recapitulation of the material facts. Ten years in the penitentiary allotted to this party by the jury.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the

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WHITE, P. J. Four parties, appellant being one of them, were found near Fort Elliott, in the Panhandle, in possession of the stolen animals. Before the theft all these parties had entered into an agreement to engage in the theft of horses, the agreement having been made in Clay County. In pursuance of this agreement, two of the confederates went into the county of Wise and there stole the animals and drove them back to Clay, where this appellant and one Scales, the remaining conspirators, furnished them provisions and arms; and a few days after the former had started on from Clay County with the herd, Scales and appellant overtook them with ten or twelve more horses, and the four then went on and remained with the herd until they were all captured. Separate indictments, simply for theft, were preferred against each of the parties, without any mention of or reference to the other parties, the co-conspirators involved in the transaction. In other words, each party was indicted as a principal offender, and as though he was alone guilty of the crime. Such is the character of indictment in this case. The defendant was simply charged with the theft of the animals.

In his charge, the court instructed the jury as follows: "In this case defendant, Fred. McKeen, stands indicted for theft, and the law is that under the indictment in this case he, the defendant, may be lawfully convicted for the theft, provided the evidence satisfies the minds of the jury beyond a reasonable doubt that he, the defendant, is guilty of the theft either as a principal or an accomplice. All persons are principals who are guilty of acting together in the commission of an offence. An accomplice is one who is not present at the commission of an offence, but who, before the act is done, advises, commands, or encourages another to commit the offence; or who agrees with the principal offender to aid him in committing the offence, though he may not have given such aid; or who promises any reward, favor, or other inducement, or threatens any injury, in order to

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procure the commission of the offence ; or who arms, or aid of any kind, prior to the commission of the offence, for the purpose of assisting the principal in the execution of the same. In order to warrant a conviction of a party shown by the evidence to be an accomplice, it is not required that the evidence should further show that such accomplice was actually personally present at the county where the theft was committed, at the time of the commission," etc.

This charge creates the only question necessary to be discussed on this record ; and that is, whether one indicted simply as a principal in an indictment can be tried and convicted as an accomplice.

Our statute defining an accomplice (Pasc. I. 1814 ; Rev. Penal Code, art. 79), and which is embodied in the paragraph of the charge above set out, makes an accomplice under our law of one who at common law and in the States is denominated "an accessory before the fact ;" and the rules with regard to the latter are, in all cases otherwise specially provided by statute, applicable in all respects to the former. Mr. Bishop says : "Therefore, the indictment is against the accessory before the fact in cases of felony, though he may be joined with the principal, the charge against him must be special. He cannot, where the common-law rule prevails, be convicted on an indictment charging him as principal." 2 Bishop's Criminal Proc., sect. 9.

In *Hughes v. The State*, 12 Ala. 458, it was held that one indicted as principal cannot be convicted on proof that he was only an accessory before the fact ; and the judge, in the opinion in that case, cites *Gordon's Case*, 1 Leach, 515, and 1 East C. L. 352, as having previously settled the question. For it is said : "There the indictment amounted to nothing more than charging the defendants as accessories before the fact, but the proof showed all to be principals in the second degree. It was held

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were improperly convicted, but the judges considered an acquittal on the charge would be no bar to a subsequent indictment charging them as accessories. In *Lowe's Case*, 1 Russ. & R. 25, the prisoners were indicted as principals, but the evidence proved them accessories only, and they were recommended for pardon on the ground that the conviction was wrong."

In the case of *McCoy v. The State*, 52 Ga. 287, it was held that on an indictment charging a defendant as principal he cannot be convicted as accessory after the fact; and it is further said in the opinion: "This court has twice decided that on an indictment charging a defendant as principal in the first degree, or as the actual perpetrator of the crime, he cannot be convicted as principal in the second degree." Citing *Washington v. The State*, 36 Ga. 222, and *Shaw v. The State*, 40 Ga. 124. The rule, it seems, is different in Iowa, Kansas, and Nevada, because they have special statutes which provide that an accessory before the fact may be charged, tried, and convicted as though he was a principal. *Bonsell v. United States*, 1 Iowa, 111; *The State v. Cassady*, 12 Kan. 550; *The State v. Chapman*, 6 Nev. 320. But there is no such statute with us; ours only going to the extent that "accomplices shall, in all cases not otherwise expressly provided for, be punished in the same manner as the principal offender." Pasc. Dig., art. 1816; Rev. Penal Code, art. 81.

The case of *Scales v. The State*, ante, p. 361, which was part and parcel of this transaction, was decided by this court at the last Tyler term, and upon a similar indictment and statement of facts this court affirmed the judgment of the lower court finding him guilty as a principal offender. In that case, however, the learned judge did not charge the law with regard to accomplices, as he has done in this case.

We are clearly of opinion, in view of the authorities quoted, that the court erred in charging the jury that they

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could, under the indictment in this case, find the defendant guilty as an accomplice; and because the charge was erroneous, the judgment is reversed and a new trial ordered.
Reversed and remanded.

HENRY BUTLER v. THE STATE.

1. EVIDENCE—CREDIT OF WITNESS.—Though in general the rules of evidence allow a witness to be contradicted only in such statements relevant to the issue, yet for the purpose of impeaching the witness it is competent to prove that he has made statements in court contrary to his testimony at the trial.
2. SAME—ACCOMPLICE.—In a trial for aiding a felon to escape from the defence elicited from the principal State's witness a denial on certain occasions and to certain persons encouraged the defendant's friends to attempt his release, and proposed to aid in effecting the same. The defence proposed, but were not allowed, to contradict the testimony of the persons designated. *Held*, error. The testimony was competent to show that the State's witness was an accomplice, on whose uncorroborated evidence a conviction could be sustained.
3. SAME—CHARGE OF THE COURT.—When there was evidence to show complicity of a material State's witness in the offence charged on the defendant, the court should have instructed the jury on the proper charge as to the accomplice testimony.

APPEAL from the District Court of San Jacinto County, Texas, below before the Hon. E. HOBBY.

The facts germane to the rulings are stated in the record.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the respondent.

WINKLER, J. From questions which were raised by the rulings of the court as to the admission of evidence at the trial below, and on the charge of the court, as the matters are set out in the record, we are led to conclude that it was at least a part of the theory of the defence

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Baldwin, the deputy-sheriff charged with the custody of the prisoner at the time the appellant was accused of procuring his release, at the time and in the manner charged in the indictment, himself connived at and participated in effecting the escape of Clark, the prisoner. It is shown by the testimony of Baldwin that he was a deputy-sheriff under the sheriff of the county; that he, with others, and among them this appellant, had gone to the jail in aid of the sheriff, to convey an intoxicated man to jail; that whilst at the jail the appellant got permission of the sheriff to give Clark, the prisoner, a drink of whiskey. He further stated that when the sheriff gave the appellant permission to give Clark the whiskey, the sheriff gave him (Baldwin) the keys to close the outside door of the jail, which he states was left open during the day for purposes of ventilation. It seems, also, from the testimony of this witness, that there were two cells on the inside of the jail, one of which was occupied by the prisoner Clark, and the other by the intoxicated man. The man who attended to feeding the prisoners being at the place, he was requested by the defendant to go and get some crackers, sardines, and tobacco for the prisoner Clark. The man alluded to was named Ruffin. Ruffin refused to go for the crackers, etc., without permission from Baldwin, the deputy. After being importuned by the defendant, the witness Baldwin says he reluctantly consented. After Ruffin left, the witness says the defendant came to him (witness) and said, "You can now give Clark the whiskey;" and at the same time pulled the whiskey out and handed it to the witness, who, it appears, had been lurking at the cell in which the intoxicated man was confined, in conversation with him. We quote what follows from the testimony as set out in the statement of facts: "I then passed from the cell where Grissom [the intoxicated man] was to the cell where Clark was, and was looking for an opening in the bars of the door of the cell large enough to put the bottle through; Clark, the prisoner, found an opening large enough, and I

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passed the bottle through to him. Then Butler drew out his knife, and told me that unless I opened the cell door and turned Clark out he would cut my throat. I told him then he ought not to act in that way; that he was already in trouble, and that this would aggravate it; that it would do Clark no good, and that he could not escape; that it would ruin me as an officer. Clark begged him not to kill me. He said he had nothing against me, but that if I did not open the door he would pin me to the wall." This is not all, but only a portion of the testimony of this witness. From this it appears that at the time the prisoner Clark was liberated from the cell and jail the only persons at the jail were the two prisoners, the appellant (Butler), and the deputy-sheriff (Baldwin). There was some conflicting and contradictory testimony.

It is shown by a bill of exceptions signed by the judge, and embodied in the transcript, that the witness Baldwin was asked by the defendant's counsel, on cross-examination, this question: "Did you, in Cold Springs, San Jacinto County, Texas, on the night before Charles Clark escaped from your custody, to wit, on the 4th day of April, 1879, in the back room of Mat Thompson's grocery, no one else being present but you two, tell Thompson that you (Baldwin) would go with any of Clark's friends and assist in any way you could in getting Clark out of jail?" To which (the State not objecting) the witness Baldwin answered: "No, I did not." At the proper time Mat Thompson, by the defendant, was put upon the stand, and he was asked by defendant's counsel: "Did not Baldwin, the witness for the State, tell you in the back room of your grocery, on the 4th day of April, 1879, the night before Clark escaped from Baldwin's custody, in Cold Springs, San Jacinto County, Texas, no one else being present but you two, that he, Baldwin, would go with Clark's friends and assist in any way he could in getting Clark out of jail?" To which question the State objected, and the court sustained the objection.

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It is shown by another bill of exceptions that this same witness, Baldwin, while testifying, was asked by the defendant's counsel, on cross-examination, if he did not, at a certain time and place mentioned, the night before the escape of Clark, say to Duke Loyd "that it was a shame for Clark's friends to let him (Clark) lie in jail; that they ought to get him out, and that you would do all you could towards getting him (Clark) out; and that if you had a horse, or two horses, you would leave the country with Clark?" To which the witness (the State not objecting) answered in the negative. At the proper time the defendant's counsel put Duke Loyd on the stand, and asked him concerning the matter of this conversation; to which the State, by counsel, objected, and the court sustained the objection.

The court, in its charge, gave no instructions to the jury on the subject of accomplices. The charge was excepted to, and the counsel for the defendant asked the court to give to the jury the following special instruction:—

"In all cases the law treats a party who aids by acts or encourages by words one in the commission of a crime as an accomplice. If you believe from the evidence that W. O. Baldwin, a witness for the State, either aided by acts or encouraged by words the defendant in turning loose Clark, as alleged in the indictment, then in that case the evidence of Baldwin alone is not sufficient to authorize you in finding defendant guilty, but there must be other evidence corroborating Baldwin's statements going to show the guilt of defendant."

We are of opinion the court erred in excluding the testimony of Thompson and Loyd under the circumstances above recited. It is true that, by the rules of evidence, it is only in such matters as are relevant to the issue that a witness can, in general, be contradicted. But it is a rule of evidence that the credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified at the trial. 1 Greenl. on Ev.,

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sect. 462. We deem the testimony offered, under the circumstances of this case, as bearing on the issue being tried, and permissible on the question of impeachment of the State's witness, Baldwin; but however this may be, it was certainly admissible as tending to show whether the State's witness, Baldwin, was a participant in the crime charged, and, when taken in connection with the other evidence, to enable the court to determine and the jury to pass upon the fact whether he had any such participation in the offence charged as that, under the law, his testimony would stand alone, or whether it required corroboration in order to warrant a conviction. We are of opinion that, under the peculiar circumstances surrounding the defendant, he was entitled to the benefit of the excluded testimony.

The judge gave as a reason for declining to give a charge on the subject of accomplices, the ground that there "was no evidence tending to show that there was any complicity on Baldwin's part in the transaction." If the testimony offered and excluded had been admitted, we cannot say the case would not have been different. To our minds, it would seem like making the commission of one error an excuse for committing another. The question in *Brown's Case*, 6 Texas Ct. App. 286, was unlike the one in the present case.

Whilst the charge asked and refused is in the main an accurate enunciation of the law, yet its verbiage can hardly be said to be free from objection. But the attention of the judge having been called to the subject, he should have given the charge as asked, if correct and applicable to the case; and if not, he should have so modified it as to have properly submitted the question to the jury. Code Cr. Proc., art. 697.

With reference to the present inquiry, we are of opinion that the judge should have submitted to the jury the question whether or not the evidence showed that the witness had participated in the commission of the offence with which the defendant was accused; and if so, the instruction

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should have followed that, if the jury so believed, in that event they could not convict on the uncorroborated testimony of an accomplice; and so shaping the charge as to conform to art. 741, Code of Criminal Procedure, and to the decisions of the Supreme Court and this court as to who are accomplices in the sense of witnesses requiring corroboration.

The above are the most important questions presented, and form the basis of our action on this appeal. Other matters are presented, but as they are not likely to arise in the same form on another trial, they are not specially relied upon here.

For the errors above mentioned a new trial should have been awarded the defendant in the court below, and on account of which the judgment must be reversed and the cause remanded.

Reversed and remanded.

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SAMUEL H. MYERS v. THE STATE.

1. CONTINUANCE. — Even before the adoption of the Revised Codes an application for a third or subsequent continuance was addressed to the judicial discretion of the trial court, and its action thereon was not revised on appeal unless an abuse of that discretion was made manifest.
2. SAME. — A severance to enable one defendant to obtain the testimony of another, by a prior trial and acquittal of the latter, is possible only when they are jointly indicted; and the purpose of such a severance is frustrated when a conviction is the result of the prior trial. An appeal from the conviction does not entitle the untried defendant to a continuance until the appeal shall be decided, and, by possibility, the appellant ultimately acquitted.
8. CHANGE OF VENUE. — The propriety of hearing testimony for and against applications for change of venue on account of prejudice is now well settled. The rulings on this subject in *Rothschild v. The State*, ante, p. 519, referred to with approval. Whether a witness examined on this inquiry has an opinion upon the guilt or innocence of the defendant is irrelevant and immaterial.

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4. **PETIT JURORS.** — Sect. 28 of the jury law of 1876 authorizes the challenge of a petit juror who has "served for one week in the District Court within six months preceding, or in the County Court within three months preceding." *Held*, that the word *preceding* has reference to a prior term of the court, and that previous jury-service during the pending term is not cause for challenge.
5. **SAME — PRACTICE.** — The overruling of a good challenge for cause is not material error when it does not affirmatively appear that the ruling forced an objectionable juror upon the defendant.
6. **CHARGE OF THE COURT.** — Though, as held in *McMillan v. The State*, *ante*, p. 142, a charge is erroneous which requires the jury to convict unless they find the defendant to be innocent, yet the context of the instruction is to be considered, with a view to determine whether such is the purport of it as an entirety.
7. **ACCOMPLICE TESTIMONY — CORROBORATION.** — The legal requirement in the corroboration of an accomplice witness is that, aside from his testimony, there be "other evidence tending to connect the defendant with the offence committed." This does not necessitate a corroboration of accomplice testimony circumstantially and in detail.

APPEAL from the District Court of Johnson. Tried below before the Hon. D. M. PRENDERGAST.

The indictment and conviction were for the murder of Mrs. Mary Ann Hester, on February 21, 1877, by shooting her with a gun. Thomas J. Myers, who is a half-brother of the appellant, and James M. Bowden, who is a brother-in-law, were separately indicted for the murder. Mrs. Hester was the step-mother of the appellant and Thomas J. Myers, having been the third and surviving wife of their deceased father, of whose will she and Thomas J. Myers were executors. She married J. A. Hester about six weeks before February 21, 1877, and they occupied the old Myers homestead; and on the evening of that day, while sitting at her supper-table with her little son, she was shot through the only window in the room, and was instantly killed.

In so far as the evidence is involved in the rulings of this court, it is sufficiently disclosed in the opinion, and no detail of it is necessary here. In Vol. VI. of these Reports, p. 1, will be found the case of *Thomas J. Myers v. The State*,

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and a full recapitulation of the material evidence upon which the conviction in this case, as well as in that, was had.

At the trial of this case, which was had at the December term, 1878, of the District Court of Johnson County, the jury found the appellant guilty of murder in the first degree, and judgment of death by hanging was rendered against him. His motion for a new trial was overruled, and he appealed. Able, elaborate, and zealous arguments were filed in this court by his counsel, and also by counsel for the State; but their length precludes their insertion.

John J. Good, W. Poindexter, and A. Bradshaw, for the appellant.

Thomas Ball, Assistant Attorney-General, and *Watts, Lanham & Roach*, for the State.

WINKLER, J. Of the several errors assigned, on account of which it is urged the judgment of the District Court is erroneous and should be reversed, the following appear to be of the most importance and to bear most especially on the right of the appellant to a fair and impartial trial in accordance with the law of the land: —

1. Did the court err in overruling the defendant's application for a continuance?

2. Was there error in refusing to grant a change of venue?

3. Were the rights of the defendant to be tried by an impartial jury impaired by the rulings of the court in the formation of the jury?

4. Did the court err in its instruction to the jury as to the law of the case in the charges given, or in refusing to give certain special charges asked by the defendant's counsel on the trial below?

Other questions are presented by bills of exception and the assignment of errors, which, in the main, so connect themselves with the questions above set out as to be con-

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sidered in connection therewith, or as incident thereto, so far as deemed of any material importance in determining the merits of this appeal.

1. With reference to the continuance. From the record-entry we make the following extract as showing the state of the continuances: "Whereupon came to the defendant's application for a continuance, the fourth being the fourth application," and it was overruled. The record does not state, nor lead to the inference, that the ground of the refusal was that it was the fourth application. The above extract is made as the only authoritative statement as to the number of continuances applied for, and we take it as being conclusive that the one overruled was, as stated, the fourth application. This not being a first or a second application for a continuance, under the statute as it stood before the adoption of the Revised Rules of Procedure, and at the time the proceeding in question was had, it comes within the following rule: "Applications for continuances not based upon the statute, and which do not meet its requirements, are addressed to the discretion of the court to whom they are made, and should be granted or refused according to the circumstances, and will not be reversed on appeal except in a clear case of abuse of discretion." *Nelson v. The State*, 1 Texas Ct. App. 292; *Baldessore v. Stephanes*, 27 Texas, 455; *Jackson v. The State*, 4 Texas Ct. App. 292. The discretion, however, is not an irresponsible one, but must be exercised within the bounds of settled rules of practice. In *Hyde v. The State*, 16 Texas, 445, the following quotation from the opinion of the court in *The People v. Vermilyea*, 7 Cow. 311, is cited with approval as illustrative of the common-law rule on the subject: "The rule is substantially the same in civil and criminal cases, though in the latter the authorities agree that the matter is to be scanned more closely on account of the superior temptation to delay and evasion of the sentence of the law. * * * In cases where t

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mon affidavit applies the court has no discretion. The postponement is a matter of right, resting on what has become a principle of the common law. But when there has been laches, or there is reason to suspect that the object is delay, the judge at the circuit may then take into consideration all the circumstances, * * * and grant or delay the application at his pleasure. Where the subject takes this turn, the application ceases to be matter of right, and rests in discretion." See *Hyde's Case*, and authorities there cited; also *Jackson's Case*, *supra*.

In this case the defendant asked a continuance on account of the absence of witnesses, — Thomas J. Myers, Jane Ann Myers, Diana Tatum (now Powell), Mat Rawlins, Thomas Koon, and L. B. Terwelliger. As to Koon and Terwelliger, the showing as to diligence is not sufficient. The affidavit states that subpoenas and attachments have been issued for them, which have been returned not served, the witnesses not being found; but there is no such stating of the diligence as that we can see from the application it was legal diligence; and further, the affidavit states, in effect, that his efforts to ascertain where they live have been ineffectual. As to Mrs. Myers and Mrs. Tatum, or Powell, the statement of facts shows that they were both present at the trial and testified at the instance of the defendant. The absent witness Mat Rawlins, it is stated in the affidavit for a continuance, resides in Tarrant County; that the witness had been served with a subpoena, and "that he had caused an attachment to be issued to Tarrant County for said witness, which has been returned not served;" and that the witness had been in attendance upon the court, and had assured the defendant's counsel he would be in attendance. No legal diligence had been used to compel the attendance of the witness. If the defendant chose to risk his promise to attend, he did so at his peril; and further, as to his testimony, it does not appear to have been of such materiality in determining the question of the defendant's guilt as to

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have had any influence on the verdict. As to remaining witness, Thomas J. Myers, his testimony inaccessible to the defendant, agreeably to his own desire. The desired witness is shown to have been in a separate indictment for the same offence of which the defendant was accused.

“Persons charged as principals, accomplices, accessories, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another so long as they remain in that relation. Penal Code, § 91; former Code, art. 230. The statute, in the same section, provides, however, that persons standing in the same relation ‘‘may claim a severance, and if any one or more be acquitted, they may testify in behalf of the others.’’ It is claimed here that a severance was had on this trial, and that there was no testimony against the indicted witness. It is further shown that he was indeed placed on the jury before whom he was tried, instead of being removed and convicted him of murder. It is urged in behalf of the appellant, and so stated in the affidavit for a writ of habeas corpus, that his said witness is innocent and has appealed, and confidently expected that the judgment of conviction against him will be reversed, and that this defendant will be thus enabled to procure his testimony.

We are not aware that the precise question here presented has been before the court of last resort in Texas in any case, and that a case of misdemeanor, in which a statute allowing a severance was construed to be to the effect that where a party had procured a severance in or out of court, or another on trial, on the idea that there was no testimony against him, and when, instead of being acquitted, he had been convicted, that this was an end of the matter. Under the law, it was believed, never contemplated that a party who had procured this proceeding could delay the trial until the other party could test the legality of his conviction by appeal. *Slawson v. The State*, decided a

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Tyler term, *ante*, p. 63. The subject of a severance and its consequences has been further considered in *Rucker v. The State*, *ante*, p. 549, where it is held that the latter portion of art. 91 of the Penal Code, which authorizes a severance, and an acquitted party to testify in behalf of the others, relates alone to those *jointly indicted*, and not to such as may be prosecuted by different indictments. So that, from the circumstances surrounding the case, as shown by the application for a continuance, the fact that two of the witnesses testified at the trial, the want of diligence as to three others, and the fact that the other stands indicted, and in the trial court convicted, and being thereby rendered inaccessible to the defendant, we are of opinion the court did not err in ruling the application insufficient and refusing to grant the desired continuance, or in refusing a new trial on account of this supposed error.

2. The alleged error of the court in refusing to change the venue away from the county of an almost unparalleled assassination, and for which the appellant had been indicted and sought to be placed on trial, is perhaps the most important question presented for the consideration of the court. It is not to be disputed that the Constitution and laws guarantee to every one accused of crime a speedy trial before an impartial jury; and if this principle applies to each individual juror, how important is it that the entire jury should not be selected from a community or county where the very atmosphere is filled with prejudice against the accused.

Various causes are assigned in the defendant's affidavit for a change of venue, but so far as the supporting affidavits are concerned, they present the one fact, "that there exists in said Johnson County, where the cause is commenced and now pending, so great a prejudice against Samuel H. Myers, defendant, that he cannot obtain a fair and impartial trial in said county." This supporting affidavit is made by thirteen persons, residents of the county, and sworn to before

the clerk of the court. The procuration for change of venue on so small a number of persons as a larger number than those who are supporting the application, as are personally known to the clerk. The grounds of resistance are :-

1. A denial of all the statements in the defendant's application, and averment that there will be a fair and impartial trial in Johnson County.

2. That at least four of the signers of the application are brothers of the defendant or of his brother, or any others who signed the application, and are not acquainted with the general sentiment of the county.

3. They say, in effect, that all the signers of the application reside in the county, and three of them with a brother who resides in the county.

4. That most of the signers are conversant with the sentiments of the county.

5. That there are at least thirty persons in Johnson County, and that a great number have moved into and become citizens of the county. Mrs. Hester, and reiterate that a fair and honest jury can be had and a fair and honest jury can be had.

The opposers offer evidence, and a number of witnesses who, they say, are well known to the citizens of the county, touching the facts of the application, affidavits have been prepared, and are sufficient to procure the written statements of the signers. They also ask the court to examine and cross-examine the signers who have signed the defendant's application, touching their knowledge, residence, motion, and relationship in the premises.

The defendant demurred to the application made by the State to a change of venue. It does not appear that the demurrer was

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The grounds of the demurrer were:—

1. Insufficiency in the counter-affidavits.
2. That said counter-affidavits merely set up negative matter.

The action of the court on the demurrer is thus stated in one of the bills of exception: The defendant's counsel asked the court to take up, hear, and pass upon the demurrer, styled exceptions, which the court refused to do, "saying he would hear the evidence and examine the witnesses, both in support of and against the motion for the change of venue, and would then pass upon the demurrer;" and there appears not to have been any further action taken directly on the demurrer. In so far as we are able to determine from the testimony taken on the application for a change of venue, the investigation turned mainly upon the issue presented by the supporting affidavits to the application, that there existed at the time in Johnson County so great a prejudice against the defendant that he could not have a fair and impartial trial in that county; and which was denied on the part of the prosecution, as set up in the first ground of the opposition, and to the means and extent of the information of those who joined the defendant in the application.

It is now too late to question the propriety of hearing, *pro* and *con*, testimony on an application for change of venue, or as to the character of such investigation. Suffice it to say that the investigation seems to have been conducted in accordance with approved rulings both of the Supreme Court and of this court; and from the evidence adduced we cannot say that it was made to appear that the defendant could not obtain a fair and impartial trial in Johnson County. For the rules heretofore adopted on this subject we refer to *Rothschild v. The State*, ante, p. 519. We are of opinion the court did not err in refusing to change the venue.

Two bills of exception were taken to the rulings of the

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court, besides the exception to overruling the application. One was that the court refused to allow time to the defendant's counsel to take down, in writing, "the evidence of the compurgators in their own words;" the other was that the court refused to permit one of the witnesses to answer a question propounded on cross-examination, to this effect: whether or not he had formed or expressed an opinion as to the guilt or innocence of the defendant. The witness was named Reeves. The objections to the rulings are met and answered by the reasons given in the statement of the judge, appended to the bill of exceptions, to this effect: "The refusal referred to in the first bill of exceptions was to delay the time of the court to take down the evidence *verbatim*, but the counsel on both sides were told that they could keep full notes of the evidence, from which a statement of facts could be easily prepared; which was, in fact, done." With reference to the second subject the statement is as follows: "The purpose of this investigation was to ascertain, as far as possible, the state of public opinion, and not the opinion of any particular individual, as to the guilt or innocence of the accused. Hence the witness Reeves was not allowed to answer the question referred to in the second bill of exceptions, but the counsel for the defendant were at the same time told that they might ask the witness any question to show his state of feeling towards the defendant, and whether he was prejudiced against him or not."

Whilst we find no material error in this ruling, we are of opinion that the principal inquiry was to the main issue being tried before the court, to wit: Was there or not, in the county, such prejudice existing as would prevent the defendant from receiving a fair and impartial trial?

3. We are unable to find that any legal right of the defendant to an impartial jury was disregarded in the formation of the jury for his trial. It is true that, agree to a bill of exceptions set out in the record, one o'

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jurors summoned on the special *venire* from which a jury was to be selected, named Brumley, on being tested as to his qualifications, showed that he had formed an opinion as to the guilt or innocence of the defendant, but that the opinion so formed would not influence his action in finding a verdict; that his opinion was made up from hearing the case talked about, and from reading an account of the evidence in the *Cleburne Chronicle*, but that he thought he could give the defendant a fair and impartial trial. On being further interrogated by the court, he stated that he would give to the evidence which tended to combat or contradict that opinion he had formed as much weight, as a juror trying the case, as he would to the evidence which tended to support that opinion. On further interrogation by the defendant's counsel, he stated that the opinion so formed would require evidence to alter it; that if the evidence given on the trial of the case was the same as that upon which he had founded his opinion, at present entertained by him, his opinion of the guilt or innocence of the defendant would be the same as that then entertained by him, and would not alter it in the trial. Thereupon the juror was by the defendant challenged for cause, which was overruled by the court; and the defendant, being required to accept or reject the juror, challenged him peremptorily.

The judge, in giving a bill of exceptions, makes the further statement: "The juror, in addition to what is stated above, said he had no fixed or settled opinion as to the guilt or innocence of the defendant, and that such as he had was rather an impression than an opinion;" and with this addition he signed the bill of exceptions. The addition made by the judge to the bill of exceptions, which we take as true, that what had been treated as an opinion formed was rather an impression than an opinion, indicates to our minds that the juror did not have a clear conception of his own mind on the subject, and the investigation does

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not free the question from doubt. If the juror had formed an opinion as to the guilt or innocence of the accused, and entertained that opinion when summoned and about to take his seat as a juror, and it would require evidence to remove it, he was not impartial, and a challenge for cause should have been sustained. *Rothschild v. The State*, above referred to. Inasmuch, however, as the accused had not exhausted his challenges at the time, and was relieved of the juror by means of a peremptory challenge, and inasmuch as it does not clearly appear that any material error, to the prejudice of the defendant, was committed by the ruling of the court, we deem it unnecessary to consider the question further than to say that in this we find no such error as would warrant an interference with the verdict and judgment.

As to the juror McKinney, when the bill of exceptions was presented to the judge for his approval and signature to the ruling that he was a competent juror, the following was appended by the judge: "I sign this bill of exceptions with this addition and explanation. The juror here named was accepted by the defendant, he up to that time having made but one peremptory challenge; and further, the answers of the juror clearly showed that he had no settled opinion as to the guilt or innocence of the defendant." We, under these circumstances, cannot say that the juror was not competent. The same may be said as to the juror Shropshire, except that he was disposed of by a peremptory challenge by the defendant. The judge, in giving a bill of exceptions to his overruling a challenge for cause, says: "This bill of exceptions is correct as far as it goes; but the juror, in addition to what is here mentioned, said that the opinion he had formed was formed merely from rumor and newspaper reports; he did not sit as a juror."

Another bill of exceptions recites that the following named persons who had been summoned on the special venire, to wit, McKinney, Harrell, and Howard Hicks,

Opinion of the court.

each being under examination touching his qualifications to serve as a petit juror on the trial of the case, answered "that he had served as a petit juror in the District Court of Johnson County for one week within the six months next preceding their said examination, to wit, at the present term of this court." On this examination these jurors were by the defendant challenged for cause, and the challenge was overruled by the court, and the defendant was ruled to accept said jurors or challenge them peremptorily. The bill of exceptions further states that, after this ruling had been made by the court, "the defendant exhausted his peremptory challenges in obtaining the eight jurors, and four persons were placed upon the jury, for the trial of this cause, after defendant's peremptory challenges were exhausted."

The challenge of these jurors was based upon that portion of sect. 26 of the jury law of 1876 (p. 83) which is as follows: The fact that a juror "has served as a juror for one week in the District Court within six months preceding," shall be good cause for challenge. This identical question has been under consideration and passed upon by this court no less than three several times, viz.: in *Welch v. The State*, 3 Texas Ct. App. 413; in *Garcia v. The State*, 5 Texas Ct. App. 337; and again in *Tuttle v. The State*, 6 Texas Ct. App. 556. In each of these cases the proper construction of that portion of the jury law quoted above was determined, and each time to the effect that the word *preceding* manifestly related to a term of the court preceding the term at which the jurors were offered, and not to the present term or the term at which the question was raised. We see no reason to depart from the rulings heretofore made on this subject. To make this objection tenable, it should have been made to appear that the juror or jurors involved in the controversy had served as a juror or jurors for one week in the District Court within the six months next preceding the term of the court at which they had been summoned as jurors and at which the question

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arose, and not, as stated in the bill of exceptions, "for one week within the six months next preceding their said examination."

It is worthy of remark, in this connection, that it is in the bill of exceptions, and in the extract set out above, "and thereafter the defendant exhausted his peremptory challenges in obtaining the first eight jurors upon the trial, and four persons were placed upon the jury, for the trial of this cause, after defendant's peremptory challenges were exhausted," that the appellant attempts to show that his rights had been prejudiced by the rulings of the court below in forming the jury for his trial. The substance of the statement is that four persons were placed upon the jury after the defendant's peremptory challenges had been exhausted; but there is no pretence that either of these four persons were in any manner objectionable to the defendant, nor is it made to appear that they, or either of them, would have been challenged peremptorily if his challenges had not been exhausted. By this ruling it is not seen that the defendant was deprived of any right guaranteed to him by the law.

4. With reference to the charge of the court. It is the duty of the judge who presides at a trial for a felony, to charge the jury the law of the case as applicable to the pleadings and the evidence adduced on the trial. It is incumbent on him to give to the jury, in plain and intelligible language, appropriate instructions as to every feature of the testimony, and as to every legitimate view they may take of the evidence. In determining the sufficiency of the charge in the present case, we have carefully considered the testimony, with all the rulings of the court in its admission or rejection, in the light of the whole case as made by the record, in order to determine whether the rights of the defendant have been properly guarded in the charge or not.

The main objections urged to the charge are, that charge on circumstantial evidence was not sufficiently

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and explicit, and that a more pointed charge on the subject of an *alibi* should have been given. In order to place themselves in proper position to avail themselves of any error to be pointed out, the defendant's counsel excepted to the charge as given, and asked the court to give such additional charges as, in the opinion of counsel, were applicable to the facts in evidence before them. It may not be amiss to premise that, as to the fact that Mrs. Hester, the deceased, came to her death at the time and place and in the manner set out in the indictment, there is but one point controverted, and that one is, who was the guilty perpetrator of the deed? The appellant and two other persons were charged by different indictments, each with the murder. One of these indicted persons, Bowden by name, became a witness against the appellant. If Bowden's testimony be true, there can be no doubt that he was, at least, one of the guilty parties; agreeably to his testimony, he and the appellant together concocted the plan which was carried out, and which resulted in a most foul and brutal assassination of an unsuspecting and helpless woman. Among the principal grounds relied on for a reversal of the judgment is that there is an absence of sufficient testimony in corroboration of the testimony of Bowden to warrant a conviction of the appellant.

These general remarks with regard to the evidence are offered in order to determine the sufficiency of the charge. As to the general features of the charge, the definition of murder generally, and of murder on express malice, and the like, are correct enunciations of law, and so as to the province of the jury to determine the weight of the testimony and the credibility of the witnesses. The charge confined the jury to the investigation of the case as one of murder in the first degree.

The charge as to principals in crime is as follows: "All persons are principals who are guilty of acting together in the commission of an offence. When an offence is actually

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committed by one person, but another is pre knowing the unlawful intent, aids by acts, or by words or gestures the person actually engaged in the commission of the unlawful act, or who, not being present, kept watch so as to prevent the interruption of a person engaged in the commission of the offence; and so are all persons principal offenders who engage in procuring aid, arms, or means of assistance to assist in the commission of an offence, while obstructing the unlawful act; or who advise or agree to the commission of the offence, and are present when it is committed, whether they aid or not in the offence. This portion of the charge is immediately succeeded by the following:—

“ 12. If, from the evidence in this case, you are satisfied that the defendant, Samuel H. Myers, fired the shot which took the life of Mrs. Mary A. Hester, or that he was connected with the killing in such manner as to render him a principal offender as explained above; and if you believe from the evidence that the killing was done with express malice as above explained, and there is no circumstance of alleviation, excuse, or justification, then find him guilty of murder in the first degree, and say by your verdict, without adding more. But if the evidence fails to satisfy you that he either fired the shot or was connected with the killing in such manner as to render him a principal, or you have a reasonable doubt as to whether he did the killing, or have a reasonable doubt as to the killing being done with express malice, you will then, in either event, find him not guilty.”

We are of opinion the charge first above set forth is an accurate statement of the law of principals, and is in the exact language of the Penal Code. Title II, sections 74 to 78 inclusive. It is argued on the part of the prosecution that the paragraph marked 12, copied

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so restrictive in its terms that the jury could not have been misled by any failure to give further explanatory charges; that the charge was favorable to the accused, and that under it the jury were required to acquit unless they were satisfied, beyond a reasonable doubt, either that the defendant fired the shot that took the life of Mrs. Hester, or that he was so connected with its perpetration as to make him a principal, as much so as if he had fired the fatal shot. We concur in this opinion. It would have been very difficult, if not impracticable, for the court to have given in this connection a proper charge on *alibi* without trenching upon the province of the jury or endangering the charge to an imputation of obscurity, or as being calculated to confuse and mislead the jury.

On the subject of circumstantial evidence the charge of the court was as follows:—

“ 13. To authorize a conviction on circumstantial evidence alone, the circumstances should not only be consistent with the guilt of the defendant, but inconsistent with any other rational conclusion or reasonable hypothesis consistent with the facts proved. The facts constituting the chain of circumstances should not only be consistent with each other and the defendant's guilt, but each fact necessary to show his guilt should be established by satisfactory evidence; and the facts and circumstances, taken altogether, should be of a conclusive nature, and leading, upon the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty of his guilt. Can the facts and circumstances you find from the evidence to be true exist, and can you, in view of these facts and circumstances, reasonably conclude that the defendant is innocent of the crime charged? If so, you should acquit him; otherwise, if they leave you without reasonable doubt as to his guilt, you should convict.”

In *McMillan v. The State*, ante, p. 142, a charge quite similar to this was held to be vitiated by the interrogation

Opinion of the court.

contained above, and marked with an interrogation point, as tending to make the innocence and not the guilt of the accused depend upon the conclusiveness of circumstantial testimony; but in that case the charge did not, as in this, call the minds of the jury back to the subject of a reasonable doubt as to his guilt, and tell them that if they had such doubt they should acquit; and besides, the word "innocent" was used in a different sense. The charge of the court on the conclusiveness of circumstantial evidence, in order to warrant a conviction on that character of testimony alone, was substantially correct, and was, in effect, the same as that asked by the defendant's counsel. The charge was not defective. *Hampton v. The State*, 1 Texas Ct. App. 652; *Williams v. The State*, 41 Texas, 209; *Rodriguez v. The State*, 5 Texas Ct. App. 256; *Harrison v. The State*, 6 Texas Ct. App. 42; and *Hunt v. The State*, ante, p. 212, where the whole subject was reviewed.

The court was requested to instruct the jury to this effect: "The jury are instructed if they believe, from the evidence, that the defendant was at the house of Thomas Myers at the time of the murder of Mrs. M. A. Hester, or if the evidence of his being at the house of Thomas Myers at the time of said murder produces on your minds a reasonable doubt of the guilt of the defendant, you will find him not guilty." Referring again to what is said as to the general charge as to principal offenders, we are of opinion that this charge was unnecessary; the subject of reasonable doubt was kept before the jury.

We have not attempted to discuss all the various views of the case presented in the voluminous briefs and discussed in the several interesting oral arguments of counsel for the appellant; but whether they have been discussed or not, they have been very thoughtfully and attentively considered, and such as have not been discussed separately are not believed to be of sufficient importance to have any material bearing on the result. One other feature of the case, how-

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ever, requires special notice. That is the fact that the principal witness against the appellant was evidently a guilty participant, if not himself the principal offender. It is claimed that his testimony is unworthy of being considered in any aspect of the case. On this subject the court instructed the jury as follows: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offence committed, and the corroboration is not sufficient if it merely shows the commission of the offence, — that is, if it merely shows that a murder has been committed, — without any evidence outside of the testimony of the accomplice tending to connect the defendant with the crime. If there is other evidence in the case, besides the testimony of the accomplice, tending to connect the defendant with the crime charged, the corroboration would then be sufficient; otherwise it would not. And if the testimony of the accomplice is thus corroborated, and the evidence then, taken altogether, satisfies you, beyond a reasonable doubt, of the guilt of the defendant, you should convict; otherwise you should acquit."

It is contended that this charge was defective in that it gave the jury no definition of the meaning of the term *accomplice*; and we are referred to *Roach v. The State*, 4 Texas Ct. App. 46, to support the position. We are of opinion the cases are not parallel; and from the prominence given to the witness Bowden, as to the fact of his having been indicted for the murder, and having procured the arrest of the defendant, and being the only witness to whom, from any thing seen in the record, the charge could with any sort of propriety apply, we are of opinion the jury could not have misunderstood or been misled by the charge. As a proposition of law, agreeably to art. 741 of the Code of Procedure, and adjudications thereunder, the charge was correct.

The authorities are not agreed as to the amount and extent

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TAYLOR v. THE STATE.

Syllabus.

Statement of the case.

The indictment charged the theft of a gelding, the property of W. B. Hurley. By the testimony of Hurley and others it appears that Taylor, the appellant, was in custody for a fine and costs, amounting to about \$11, and that at his request Hurley paid the sum, and received the gelding as a pledge for its repayment in two or three weeks. Hurley testified that the horse was to become his property if the defendant failed to pay within the time limited, and that he did so fail, whereby the witness thereafter considered himself the absolute owner of the animal. It appears further from his testimony, however, that after the lapse of two or three months Hurley played "poker" with the defendant, the stakes being the defendant's debt to him on the one hand and defendant's interest in the horse on the other. Hurley won, and, according to his testimony, the defendant never afterwards asserted any claim upon the horse, but proposed to put up a certain amount of stone fence for Hurley as a price for the animal; but that this offer was declined. Within a few weeks after the pledge, the defendant went to live at Hurley's, on an agreement, according to the latter, that he should do what little jobs his ill-health would permit, without other compensation than his board, etc. He remained there some six months, occasionally doing light work, such as pulling fodder, hauling wood, and herding horses. The horse in the meantime was allowed to run on the range, and disappeared therefrom contemporaneously with the departure of the defendant. Hurley went in pursuit, and came up with the defendant and the horse at Fort Worth. On the part of the defence there was evidence that during several weeks after the pledge the defendant occasionally had the horse in his actual possession, and exercised several acts of ownership over him by loaning him on one or two occasions, etc. The defence offered to prove declarations made by the defendant when he took the horse. On objection by the prosecution these declarations were excluded, and the defence took a bill

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debt, without regard to its ultimate probable effect upon such bailee or mortgagee.

All authorities, however, concur in holding that in prosecutions of this character it is the right of the defendant to introduce and the duty of the court to admit in evidence every possible fact which can legitimately tend to illustrate the *animus* of the defendant in taking his property, and which may serve to disprove any fraudulent motive for his conduct. Roscoe's Cr. Ev. 22; *Spivey v. The State*, 26 Ala. 103; *The People v. Stone*, 16 Cal. 369. In the case last cited, which in most of its features is very similar to the case at bar, Judge Baldwin, in delivering the opinion of the court, said: "The crime of larceny is compounded of the taking and carrying away of property, *and* the felonious intent. Whatever has a legal tendency to show the intent is proper evidence. The facts sought to be introduced, whatever weight they were entitled to, tended to explain the transaction. If, for example, the defendant showed that this debt had been discharged, and that by the contract this discharge revested the property in him, the taking of the property from the possession of Barrett would be presented in a different light from that of a taking when he had no right or claim to it. It is not every trespass that is a larceny. The felony is in the intent to appropriate another's property, the taker knowing that he had no right or claim to it; and although this intent may sometimes be presumed from circumstances, yet in cases like the present the law permits all the facts connected with the title and the taking to come before the jury, that they may judge of the intent."

In so far as the evidence upon the trial is disclosed by the statement of facts, there is an almost entire absence of evidence in behalf of defendant which might tend to explain his motive in the taking, or the particular theory as to his right to the property upon which his action was based. It may be assumed that his defence was rested in

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TAYLOR v. THE STATE.

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— must answer upon the assumption that the

 Opinion of the court.

JOHN HANNAHAN v. THE STATE.

1. **THEFT — OWNERSHIP — VARIANCE.** — Before the Revised Codes took effect, an indictment charged theft of a steer, the property of C. The proof showed that the animal was the joint property of C. and another, and not in the actual possession and control of either of them when stolen. *Held*, that the variance between the allegation and the proof is fatal to the conviction.
2. **SAME — CHARGE OF THE COURT.** — In the state of case above indicated, notwithstanding the Revised Codes were in effect when the trial was had, it was error to give in charge to the jury art. 426 of the Code of Procedure, which has changed the previous law on this subject, and allows an indictment for the theft of property owned in common or jointly by two or more persons to allege the ownership in all or either of them. A retroactive application of this provision makes it *ex post facto*.
3. **ACCOMPLICE TESTIMONY.** — An accomplice witness cannot corroborate his own testimony. See an instruction likely to mislead the jury on this subject.
4. **CUMULATIVE SENTENCES.** — The Revised Code of Criminal Procedure, art. 800, provides that cumulative terms in the penitentiary, adjudged at the same term of court, shall be so tacked that each subsequent term shall begin at the expiration of the preceding one. But the application of this provision to offences committed prior to the Revised Codes is error; because, being more onerous than the preëxisting law, it would be *ex post facto* if enforced for antecedent offences.

APPEAL from the District Court of Uvalde. Tried below before the Hon. T. M. PASCHAL.

The opinion discloses the case.

No brief for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

WHITE, P. J. Ownership of the animal alleged to have been stolen was averred in the indictment to be in Henry Cox. The evidence showed it to have been taken from its accustomed range, and that it was in the joint mark and brand of Henry Cox and William Cox. In paragraph 3 the court instructed the jury in the charge as follows: "Where there is more than one owner of property alleged

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Another error committed was in rendering judgment that the punishment assessed—to wit, the imprisonment, in this case—should take effect and begin at the expiration of the term imposed upon defendant by a previous judgment of conviction had in another case. Before the adoption of our Revised Codes, the District Court had no authority to fix the commencement of a term in the penitentiary at the expiration of another term, but the term of punishment always began from the date of the sentence, no matter how many convictions there were. *Prince v. The State*, 44 Texas, 480. This was the law at the date of the commission of the offence. The present statute, providing otherwise, having been since adopted (Rev. Code Cr. Proc., art. 800), and being more onerous, is *ex post facto* when applied to offences committed before its adoption.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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A.

ACCOMPLICE TESTIMONY.

1. Concealment of knowledge that a felony is to be committed does not of itself implicate the party concealing it as an accessory before the fact, nor necessitate corroboration of his testimony. *Noftsinger v. State*, 801; *Rucker v. State*, 549.

2. See evidence, by comparison of handwriting, held insufficient to corroborate an accomplice witness in a trial for murder. *Jones v. State*, 457.

3. One accomplice witness cannot corroborate another. *Heath v. State*, 464.

4. A detective who feigned complicity with the offender is not an accomplice witness. *Wright v. State*, 574.

5. In a trial for aiding the escape of a felon, a State's witness denied that he encouraged and offered to assist the criminal enterprise, and the defence proposed to contradict his denial. *Held*, competent to contradict him, and thus show him to be an accomplice witness. *Butler v. State*, 635.

6. The testimony of an accomplice need not be corroborated circumstantially and in detail. Other evidence "tending to connect the defendant with the offence committed" is all the corroboration required. *Myers v. State*, 640.

7. An accomplice cannot corroborate himself. *Hannahan v. State*, 664.

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AGGRAVATED ASSAULT.

1. See facts held insufficient to sustain a conviction for aggravated assault with a gun, the acts of the defendant being deemed as only preparatory. *Young v. State*, 75.

2. Conviction sustained for aggravated assault with a knife, though the accused neither struck with it nor was prevented from striking. *Johnson v. State*, 210.

3. Chastisement of the wife by the husband is not permitted by the law of this country, however it may formerly have been in England. *Owen v. State*, 329.

ALTERING CATTLE-BRANDS.

1. To constitute the alteration of a brand, the original scar need not be changed; it may be effected by clipping the hair. The means used is

ALTERING CATTLE-BRANDS — Continued.

immaterial, provided the brand on another's animal is altered with fraudulent intent. *Slaughter v. State*, 123.

2. Note facts held sufficient to show that the alteration was with a fraudulent intent. *Id.*

AMENDMENT.**APPEAL.****MINUTES OF COURT, 5.**

1. A motion to amend the minutes of a former term so as to recite the presentment of the indictment is allowable, but the amendment should be made *nunc pro tunc*, and must be actually entered upon the minutes of the court. *Cox v. State*, 495.

2. See in this case parol evidence held insufficient to warrant the amendment of the minutes of a former term. *Id.*

3. The introductory clause of an indictment may be amended by the insertion of the style of the court and term. *Banks v. State*, 591.

APPEAL.

1. An appeal to this court suspends all further proceedings in the case by the court *a quo*, until it receives the judgment of this court. Pending an appeal, the minutes of the court below cannot be so amended as to show that the defendant pleaded to the indictment. *Knight v. State*, 203.

2. Appeal may be prosecuted immediately on the rendition of the judgment, without awaiting the close of the term. *Id.*

3. *Quære*, whether an appeal lies from a district judge's order on *habeas corpus*, remanding into custody a party detained under an extradition warrant. *Ex parte Erwin*, 288.

4. Appeal dismissed for want of a final judgment is subsequently reinstated on a showing by the appellant that a final judgment was rendered below. *Downs v. State*, 483.

ARREST.

1. No arrest without a warrant can be lawfully made in this State except for a felony or an "offence against the public peace," committed in the presence or view of the apprehender. *Lacy v. State*, 403.

2. Though theft may be prosecuted in any county to or through which the stolen property is taken, yet such asportation is not the commission of theft "in the presence or within the view" of the apprehender. *Id.*

ARREST OF JUDGMENT.

1. Indictment spelled January "Janury," and the proper name Pettis "Pittis," if the dot over the second letter controlled. *Held*, not cause in arrest of judgment. *Hutto v. State*, 44.

2. Invalidity or want of an order of the District Court transferring a misdemeanor case to an inferior court is not cause in arrest of judgment. *Friedlander v. State*, 204.

3. Motion in arrest of judgment impugns an indictment or information only for the substantial defects specified in the Code of Criminal Procedure. *Id.*

4. Failure of the minutes of court to show a presentment or return of the indictment is not cause in arrest of judgment. *Johnson v. State*, 210.

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ASSAULT WITH INTENT TO COMMIT RAPE.

1. In a trial for this offence, the court below gave the jury the statutory definition of rape, and the punishment intent to commit rape, but gave no instruction on the *Held, error*, this offence being a felony. *Hemanus v. State*.

2. Assault with intent to commit rape includes an aggravated assault and a simple assault, or assault and battery, but not an attempt to commit rape. *Brown v. State*, 569.

ASSAULT WITH INTENT TO MURDER.

1. Indictment for this offence includes aggravated assault and evidence of the latter is therefore admissible on a trial for murder. *Moore v. State*, 14.

2. Indictment must expressly allege whom the accused intended to murder. It will not be inferred that he intended to murder the victim. *Wimberly v. State*, 829.

3. Defendant, while intoxicated, and without provocation, fired his pistol towards his friend, and missed seven or eight feet distant. *Held*, that the question whether he fired with the purpose of striking, or shot in mere bravado, is an issue, and one which should have been distinctly submitted to the jury. The charge was erroneous which assumed the purpose to strike. *Walker v. State*, 627.

ATTEMPT TO COMMIT RAPE.

1. Attempt to commit rape on a female under ten years of age, perpetrated with her consent, and without force, threats, or intimidation. *v. State*, 842.

2. A conviction for an attempt to commit rape cannot be a ground for an indictment for an assault with intent to rape. There is no attempt to commit an assault with intent to rape. *Brown v. State*.

B.

BAIL.

1. In extradition cases the right of bail does not obtain. *Id.*, 288.

2. The Revised Code of Criminal Procedure empowers a hearing on *habeas corpus*, to bail the applicant from day to day until the power expires with the determination of the case. *Id.*

BAIL-BOND.

RECOGNIZANCE.

1. Appearance-bond bound the defendant in \$150, or "— dollars." *Held*, nugatory as to the sureties. *Townsend v. State*.

2. Note variance between a bail-bond offered in evidence and the *scire facias*, *held* sufficient ground to exclude the jury. *Smith v. State*, 160.

3. A bail-bond binds the makers for the appearance not only in the court designated therein, but in any other court. This case may by law be transferred; and the makers cannot be relieved of the constitutional or statutory provisions which authorize the issuance of a writ of *habeas corpus*.

BAIL-BOND — Continued.

fer, — as, for instance, in misdemeanor cases transferred from the District to the County Courts. *Pearson v. State*, 279.

4. Bail-bond made in 1876, and conditioned for the defendant's appearance before the "Criminal Court of McLennan County," was void because there was no such court. *Downs v. State*, 488.

5. The bond must show the time and place for the defendant's appearance; but the time is sufficiently stated by the term of the court, and the place by the name of the court and the county. Stipulation that he will appear on a certain day before "said examining court," without designating the magistrate, is not sufficient. *Crowder v. State*, 484.

6. Forfeiture cannot be taken before the appearance day. *Id.*

BILL OF EXCEPTIONS.

1. District Court rule 56 allows exceptions to evidence to be reserved in the statement of facts, instead of by bill; but the exceptions must be fully noted. *Cooper v. State*, 194; *Castanedo v. State*, 582.

2. To authenticate a bill of exceptions by signatures of by-standers, the statutory requisites must be complied with. Recital that the judge had refused to sign it is not enough. *Knight v. State*, 206.

BRIBERY.

1. If an officer first suggests his willingness to accept a bribe, and thereby originates the criminal intent, the defendant, by acceding, does not commit bribery under the Code of this State. *O'Brien v. State*, 181.

2. But if the defendant offered to bribe the officer, no subsequent conduct of the officer exculpates him. *Id.*

BURDEN OF PROOF.

1. On the issue of guilty or not guilty, the burden of proof never shifts from the State to the defendant. *Shafer v. State*, 289.

2. The burden of proof is always on the State to overcome the presumption of innocence and establish the defendant's guilt beyond a reasonable doubt; but when the inculpatory facts have been proved, it is incumbent on him to prove any facts on which he relies for exculpation, unless they appear from the evidence against him. *Leonard v. State*, 417; *Lewis v. State*, 567.

BURGLARY.

1. The intent being of the essence of burglary, and a fact to be proved by the State, it should be expressly alleged in the indictment. *Reeves v. State*, 276.

2. In a trial for burglary, and for theft after the burglarious entry, the law of both offences should be given in charge to the jury. *Struckman v. State*, 581.

3. Indictment for burglary must allege that the entry was effected by force, threats, or fraud, and without the free consent of the occupant, or of some one authorized to consent. An averment that the entry was "with force and arms" does not supply these allegations, nor, under the Code of this State, are those words necessary in the indictment. *Brown v. State*, 619.

4. And the indictment must set forth with certainty the offence with intent to commit which the burglarious entry was made. *Id.*

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CHALLENGE TO THE ARRAY, AND OTHERWISE — Continued.

served "in a former trial of the same case, or of another case involving the same questions of fact." *Held*, applicable in criminal as well as civil trials, and a challenge for such cause is well grounded. *Dunn v. State*, 600.

9. The overruling of a good challenge for cause is not material error unless it forced upon the defendant an objectionable juror. *Myers v. State*, 640.

10. Previous jury-service at the same term of court is not cause for challenge under the jury law of 1876. The word *preceding* in sect. 26 of said act has reference to a prior term of the court. *Id.*

CHANGE OF VENUE.

1. Though the application and affidavits for a change of venue comply strictly with the requirements of the Code, it does not follow that the order must be made. The Revised Code provides that the "truth and sufficiency" of the alleged causes shall be determined by the trial court. *Quære*, whether its determination will hereafter be revisable on appeal. *Daugherty v. State*, 480.

2. The original Code of Procedure allowed only one change of venue at the defendant's instance, and for that the supporting affiants were to be citizens of the county where the prosecution was instituted, and the cause was to be transferred to the county whose court-house was nearest, unless valid objections thereto appeared. *Rothschild v. State*, 519; *Myers v. State*, 640.

3. By the act of 1876, the district judge, in any case of felony, could of his own motion change the venue to any county in his own or an adjoining district, stating his reasons in his order. His refusal to exercise this power was not assignable as error, nor his exercise of it ordinarily revisable on appeal. *Id.*

4. The application and hearing are proceedings preliminary to trial, and not part of the trial; and therefore the defendant's presence is not necessary. *Id.*

5. The Revised Code of Procedure (art. 583) provides that "the credibility of the persons making affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person, and the issue thus formed shall be tried and determined by the judge." *Held*, that the State's attorney may make the attacking affidavit. A truthful is not always a "credible" person, in a matter of this kind. *Dunn v. State*, 600.

6. The propriety of hearing testimony for and against a change of venue on account of prejudice, is now well settled; and on this inquiry it is not material whether a witness has an opinion upon the guilt or innocence of the accused. *Myers v. State*, 640.

CHARGE OF THE COURT.

1. Refusal to give in charge the presumption of innocence is error; mere omission to do so, when not asked, is not. *Hutto v. State*, 44; *Frye v. State*, 94.

2. A minor degree of the offence alleged in the indictment need not be noticed in the charge, unless there be evidence requiring that it should be. *Id.*

3. In an introductory clause of the charge, the name of a co-defendant

CHARGE OF THE COURT — Continued.

not on trial was miscalled. *Held*, not material error, nor within the scope of a general exception to the charge. *Crutchfield v. State*, 65.

4. Instruction in a theft case that circumstantial evidence must, to warrant a conviction, be "incapable of explanation on any other rational hypothesis but that of the defendant's guilt," *held* sufficient on the subject. *Id.*

5. Not error to omit instructions on degrees in the weight of evidence, whether direct or circumstantial, unless some portion be within the exceptions to the general rule, — as, for instance, the testimony of an accomplice. *McMillan v. State*, 100.

6. Note a state of case in which it was charging on the weight of the evidence to instruct that, with equal opportunities, the testimony of an affirmative witness was preferable to that of one who failed to see the act in question. *Haskew v. State*, 107.

7. Not error to refuse a requested instruction predicated on the erroneous assumption that the State's evidence was wholly circumstantial, and directed an acquittal unless the defendant's guilt had been demonstrated beyond possibility of his innocence. *Irvin v. State*, 109.

8. In a misdemeanor case, the court need not charge the jury unless requested by counsel, and then the requested instruction must be presented in writing. Without giving a charge, the court may read to the jury the definition of the offence, and its punishment, as provided in the Code. See this case *in extenso* on the provisions of the Code governing charges in misdemeanor cases. *Hobbs and Harris v. State*, 117.

9. The testimony of belligerents cannot be presumed to be better evidence of the *res gestæ* than that of by-standers, and an instruction based on such an assumption was properly refused in a trial for murder. *Lanham v. State*, 126.

10. In a trial for felony, the court instructed for acquittal "if the jury could reasonably conclude that the defendant is innocent;" otherwise for conviction. *Held*, essentially erroneous, and prejudicial to the defendant, by overslaughing the presumption of innocence and reversing the requirement that the guilt, and not the innocence of the defendant was the issue. *McMillan v. State*, 142.

11. In a trial for murder, the charge informed the jury that the defendant, on a former trial, had been convicted of murder in the second degree, and thereby acquitted of the first degree. *Held*, proper to instruct the jury to consider of no higher offence than murder in the second degree, but not to inform them of the previous conviction in a manner prejudicial to the defendant. *West v. State*, 150.

12. Instruction to the effect that an act done in a state of insanity is not punishable, and that the true inquiry is whether the accused was capable of having, and did have, a criminal intent, and the capacity to distinguish between right and wrong in respect of the particular act of which he is charged, accords with the adjudication of this and other States. *Williams v. State*, 163.

13. The charge must not discuss the facts, weigh the evidence, sum up the testimony, or use any argument likely to arouse the sympathy or

CHARGE OF THE COURT — *Continued.*

passion of the jury. Even the appearance of an intimation of the judge's opinion should be avoided. *Stuckey v. State*, 174.

14. Correct, in a trial for bribery, to instruct that if the accused offered to bribe an officer, no subsequent conduct of the officer could exculpate him. *O'Brien v. State*, 181.

15. Verbal charges are prohibited in all felonies, and are allowed in misdemeanors only when the parties consent. When given in a misdemeanor case without such consent, exception must be reserved at the time. *Lawrence v. State*, 192.

16. In a trial for murder in the first degree, committed since the Constitution of 1876 became operative, and before the Revised Penal Code took effect, it was not error to instruct the jury that the penalty for murder in the first degree was death. The power of juries, while the Constitution of 1869 was in force, to substitute life imprisonment in lieu of the death penalty was not "law applicable to the case;" but it still is in a trial for a murder committed while the Constitution of 1869 was in force. *Hunt v. State*, 212.

17. Courts should not attempt novel expositions of the law, but should adhere to the language of established authorities. *Id.*

18. If the inculpatory evidence in a murder case be purely circumstantial, the charge should expound the principle that the facts must be explicable only by the hypothesis of guilt, be consistent with each other and the main fact, and each be established by evidence as cogent as if it were the main fact. This is not a charge on the weight of evidence, nor supplied by the usual instruction on reasonable doubt. *Id.*

19. A charge on self-defence is objectionable, and may be erroneous, if it limits the right of self-defence to actual danger. *Marnoch v. State*, 269; *Pharr v. State*, 472; *Richardson v. State*, 486.

20. Appellant was tried since the Revised Codes took effect, for murder committed prior thereto, but elected to be punished under the law in force when the offence was committed. The jury were instructed that if they found him guilty of murder in the first degree they should simply so say, without concerning themselves about the punishment. *Held*, correct. *Noftsinger v. State*, 301.

21. The penalty for a felony must be charged, and correctly charged; otherwise the conviction cannot stand, even though the punishment assessed might lawfully have been assessed under a correct charge. *Jones v. State*, 338.

22. When *alibi* is the defence, the charge should explain its nature and character. *Deggs v. State*, 359.

23. In a trial for theft, the court charged that all parties were principals who acted together in the theft, pursuant to a common intent and previously formed design, though not all personally present when the theft was committed. *Held*, correct. *Scales v. State*, 361.

24. If the property was stolen from the possession of a person holding it for the owner, the charge should apprise the jury of the necessity of proof showing the want of that person's consent to the taking. *Jackson v. State*, 363.

25. The jury should not be so instructed as to warrant them to select

CHARGE OF THE COURT — Continued.

arbitrarily what evidence they will believe; but they should be left to their own mode of reasoning on the evidence. *Id.*

26. In a trial for assault with intent to commit rape, the law of assaults, as well as that of rape, should be given in charge to the jury. *Hemanus v. State*, 872.

27. Not material error to mistake the year of the offence in the introductory clause of the charge, when subsequent clauses corrected the mistake. *McCoy v. State*, 879.

28. In a trial for theft, even vague evidence of a *bona fide* purchase of the property by the accused necessitates the submission of that issue to the jury; and this court cognizes the omission, though not assigned as error. *Smith v. State*, 882.

29. When the inculpatory evidence is in the main circumstantial, the law governing that kind of evidence should be charged. *Id.*

30. The charge should not indicate to the jury any preference of the court between the alternative penalties prescribed by the Revised Penal Code for murder in the first degree. *Doran v. State*, 885.

31. If in a trial for murder the evidence tends, by any legitimate deduction, to make a case of manslaughter, the law of manslaughter must be given in charge to the jury; and if the necessity for the charge be doubtful, it should be given. *Williams v. State*, 896.

32. If the law applicable to every legitimate deduction from the evidence be given to the jury, the charge is sufficient. *Smith v. State*, 414.

33. When all exculpatory evidence, if any existed, was peculiarly accessible to the defendant, it was proper and requisite to give in charge to the jury art. 51 of the Revised Penal Code, which provides that, "when the facts have been proved which constitute the offence, it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or omission." This neither shifted the burden of proof, inverted the presumption of innocence, nor counter-vailed the reasonable doubt. *Leonard v. State*, 417.

34. A charge is erroneous which permits a conviction for murder in the second degree without a finding that the killing was on implied malice. *Shrivers v. State*, 450.

35. When the inculpatory evidence consisted chiefly of the testimony of two accomplices, the jury should have been instructed that one accomplice cannot corroborate another. *Heath v. State*, 464.

36. Omission to charge the law applicable to every legitimate deduction from the evidence is, if duly excepted to, expressly made error in trials for felony. In a trial for theft, evidence tending to prove a *bona fide* purchase of the property by the accused required that issue to be submitted in the charge. *Id.*

37. See instructions held sufficient in a trial for theft of an estray. *Owens v. State*, 470.

38. In a trial for murder committed in the perpetration of robbery, rape, arson, or burglary, the charge to the jury must not ignore the element of malice, express or implied. *Pharr v. State*, 472.

39. No intimation of the opinion of the court on the credibility of evidence should be given by the charge or otherwise. *Id.*

CHARGE OF THE COURT—Continued.

40. The mere enunciation of the statutory provisions respecting justifiable homicide will often be inadequate in a charge on that subject. *Richardson v. State*, 486.

41. When, in proof of guilty knowledge or intent, the State was allowed to show collateral facts, or such as constituted another offence, the charge should have guarded the jury from acting thereon as proof of the *res gestæ*. *Francis v. State*, 501.

42. A charge may be composed of relevant excerpts from the Codes, and still be inadequate and erroneous. *Id.*

43. If, in a trial for infanticide, there was any evidence from which the jury might have inferred that the defendant killed her child before it was fully born, or by means used merely to aid her delivery, it was incumbent on the court to instruct for an acquittal in the event they so found. *Wallace v. State*, 570.

44. The State's principal witness was a detective, and ostensibly an accomplice of the defendant, and the charge left it to the jury to determine whether his complicity was real or feigned, with proper instruction on the law of accomplice testimony. *Held*, correct. *Wright v. State*, 574.

45. In a trial for burglary and theft, the law of both offences should be given in charge to the jury. *Struckman v. State*, 581.

46. When the inculpatory evidence is purely circumstantial, the charge must expound the nature and cogency of that species of proof. *Id.*

47. If, in a trial for theft, there be evidence tending to show that the taking, though wrongful, was not with fraudulent intent, that issue should be expressly submitted in the charge. *Banks v. State*, 591.

48. It is well to give requested instructions, if correct, notwithstanding they have already been substantially given in the charge. *Id.*

49. In a trial for unlawful marriage, the court charged that if a person was shown to have been living at a certain time, his continued existence for seven years thereafter is to be presumed, and that a party who asserts his death within that time has the burden of proving it. *Held*, an erroneous instruction, because it invaded the province of the jury and exonerated the State from proof of a constituent of the offence. *Hull v. State*, 593.

50. Instructions given at the request of the jury must be limited to the particular matter indicated by the jury. See this case in illustration. *Hannahan v. State*, 610.

51. After the charge was read to the jury, and before they retired, the judge corrected the portion of it which stated the number of years which would bar prosecution for the offence. *Held*, not error. *Baker v. State*, 612.

52. In a trial for conveying into a jail articles useful to aid the escape of prisoners, the court below charged the provision of the Code which defines and punishes the aiding of prisoners to escape from an officer. *Held*, error. *Mason v. State*, 623.

53. In a trial for assault with intent to murder, the material question being whether the accused shot in earnest or mere bravado, a charge was erroneous which assumed the purpose to strike, and instructed the jury

CHARGE OF THE COURT — Continued.

that the law implied malice from the use of a pistol. *Walker v. State*, 627.

54. In a trial of a party indicted as a principal offender, it was error to give in charge to the jury the provision of the Code defining accomplices, as the law applicable to the case. *McKeen v. State*, 631.

55. When there was evidence tending to show complicity of a material State's witness in the offence charged against the defendant, the court should have instructed the jury on the law governing accomplice testimony. *Butler v. State*, 635.

56. A charge is erroneous which requires the jury to convict unless they believe the accused to be innocent; but whether such is the effect of an instruction is determinable from its context and entirety. *Myers v. State*, 640.

CONFESSIONS.

1. Confessions made in arrest are evidence if voluntarily made, after due caution of the defendant that they may be used against him. *Shafer v. State*, 239.

2. No inflexible rule controls the admission of a confession made after a previous one had been improperly educed; the inquiry is whether the improper influence impaired the spontaneity of the last confession, and if this be doubtful it should be excluded. *Walker v. State*, 245.

3. To warrant the admission in evidence of a confession made in arrest, it must be shown not only that it was voluntarily made by the prisoner, but that before it was made he had been properly cautioned that his statements could be used against him. *Jackson v. State*, 363.

4. Statements of an uncautioned prisoner cannot be made evidence by proof that while he was in custody they were repeated in his presence and he made no reply. *Shrivers v. State*, 450.

CONSTITUTIONAL LAW.**EX POST FACTO.****FORGERY, 1.****UNLAWFUL MARRIAGE.**

1. Sect. 21 of the "act regulating elections" relates to the closing of liquor-shops during the day of any election, and imposes penalties on vendors of liquors in violation of its prohibitions. *Held*, that these provisions do not conflict with the constitutional requirement that an act shall embrace but one subject, and that it shall be expressed in the title of the act. *English v. State*, 171.

2. Written constitutions are not to be construed by technical rules, but so as to accomplish their purposes and the ends of government. See the opinion *in extenso*. *Hunt v. State*, 212.

3. The Constitution of 1876 wholly superseded that of 1869, but, in abrogating the provision of the latter which empowered juries to substitute imprisonment for life in lieu of the death penalty, it did not abrogate the antecedent statutory punishment of death prescribed for murder in the first degree. *Id.*

4. The right of bail does not obtain in extradition cases. *Ex parte Erwin*, 288.

CONSTITUTIONAL LAW — *Continued.*

5. The act of 1876 "to provide for the detection and conviction of all forgers of land-titles" is constitutional. *Francis v. State*, 501.

CONSTRUCTION OF STATUTES.

STATUTES CONSTRUED.

1. The legislative intention is the objective point of all rules of construction, and those rules are to be applied in subordination to the legislative intention. Note the opinion on this subject, with especial reference to the effect on previous laws of the adoption of the Revised Statutes and Codes. *Walker v. State*, 245.

2. Repeal by implication is not favored; the repugnancy must be obvious, unavoidable, and irreconcilable. *Id.*

CONTINUANCE.

1. Defendant asked a continuance because his ignorance and imprisonment disabled him from procuring witnesses to prove an *alibi*, but named no witnesses and gave no assurance that a continuance would secure any. *Held*, far short of a legal showing, and not even a reasonable appeal to the discretionary power of the court below. *Colton v. State*, 50.

2. If there has been a severance, and the party first tried be convicted and appeals, this does not entitle the other defendant to a continuance for the purpose of awaiting the final result of the appealed case, to obtain the testimony of the appellant if acquitted. *Slawson v. State*, 63; *Myers v. State*, 640.

3. If the witness resides in a county other than that of the forum, an attachment for him, and not a subpoena, is the process necessary to show diligence. *Chaplin v. State*, 87.

4. An absent witness is immaterial if his testimony is desired to prove that the defendant acted in ignorance of a matter of law, — for instance, that the county was one in which the carrying of weapons was prohibited. *Id.*

5. Not error to refuse a continuance asked to procure proof that the deceased was a violent and dangerous man, without proof that he made hostile demonstrations against the defendant. *Frye v. State*, 94.

6. Diligence is not shown unless the application states whether the process has been returned, and if so, when and by whom. *Cooper v. State*, 194.

7. In revising the refusal of a continuance, the materiality of the absent testimony is considered in the light of the evidence adduced at the trial. *Willison v. State*, 400.

8. Prior to the Revised Codes, the refusal of a second continuance was erroneous if the application conformed to the law and no sufficient counter-showing was made. *Vickery v. State*, 401.

9. An uncautioned prisoner's statements, based on hearsay and proved by his custodians, are held in this case to be incompetent to countervail his application for a second continuance; and the practice of thus using such statements is reprehended. *Id.*

10. The Revised Code of Criminal Procedure, art. 560, subjects the truth, sufficiency, and merits of all applications for continuance to the discretion of the trial court; but this nowise relaxes the diligence required,

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CONTINUANCE— *Continued.*

nor dispenses with a bill of exceptions, when the error. *Reynolds v. State*, 516.

11. If the application failed to show diligence repaired in the motion for a new trial. *Id.*

12. Diligence is wanting when it appears that at trial a subpoena for the absent witness was returned and other process for him was sued out. *Id.*

13. Counter-affidavits are admissible to show want of diligence. *v. State*, 549.

14. Even before the Revised Codes took effect continuance was discretionary with the trial court and ordinarily revisable. *Myers v. State*, 640.

COSTS.

When death or imprisonment for life is adjudged should be rendered. *Lanham v. State*, 126.

COUNTY COURTS.

All misdemeanors cognizable by justices of the peace by the County Courts. *Chaplin v. State*, 87.

COUNTY SURVEYORS.

UNLAWFUL PURCHASE OF PUBLIC LAND.

D.

DEADLY WEAPONS.

CARRYING WEAPONS.

DEFACING CATTLE-BRAND.

In a trial since the Revised Codes took effect, for the first time to that event, with intent to defraud one G., alleged owner of an animal, the proof showed that the animal belonged jointly to G. and was not under the exclusive control of either party. *variance*, and one not cured by art. 426 of the Revised Codes, which allows ownership to be alleged in any or all counts. Said article, being a new provision, cannot apply to the case. *Calloway v. State*, 585.

DISTURBING PUBLIC WORSHIP.

1. The statute protects a religious assembly from disturbance during its services, but as long as any of the counts are proved on the premises. See facts in illustration. *Dawson v. State*.

2. If all the prohibited modes of disturbance disjunctively in the statute be charged in a single count, the conjunction is required in lieu of the disjunctive *or* employed in the statute.

DYING DECLARATIONS.

EVIDENCE, 10.

E.

ELECTION LAW.

1. Prosecutions for violation of the act of 1876, c.

ELECTION LAW — Continued.

lating elections," may be instituted by information as well as indictment. *Haines v. State*, 30.

2. The phrase "entire day of any election," used in said act, means the natural day commencing and ending at midnight, and is not intended to comprise merely the hours during which the polls are open. Note the facts of these cases. *Id.*; *Lawrence v. State*, 192.

3. Sect. 21 of said act, which relates to the closing of liquor-shops during the day of any election, and imposes penalties on offenders, does not conflict with the constitutional requirement that an act shall embrace but one subject, and that it shall be expressed in the title to the act. *English v. State*, 171.

4. The authority conferred on judges of elections to close liquor-shops on election days implies no power in them, or any other officials, to permit them to be kept open. *Id.*

EMBEZZLEMENT.

1. Indictment need not allege that the embezzled property was taken with intent to deprive the owner of it or its value, and to appropriate it to the taker's benefit. *Leonard v. State*, 417.

2. Designation of a certain national bank as "an incorporated company, then and there duly and legally established, organized, and existing under and by virtue of the laws of the United States, as an incorporated company," held a good description of the owner. *Id.*

3. In the trial of a bailee, the terms of the bailment were evidence for the State; and proof of a qualified ownership in the alleged owner, with the right of possession and control, sufficed on the ownership. *Id.*

4. The doctrine of *ultra vires*, asserted against the ownership alleged, cannot avail as a defence in cases of theft, embezzlement, and the like. *Id.*

5. Briefly defined, embezzlement is the fraudulent appropriation of another's personal property by one intrusted with it. This offence originated from defects in the common law of larceny, and the Penal Code provides for it the same penalty as for theft. *Id.*

6. The fraudulent appropriation may be done in any effectual manner. Sale of a bailment by the bailee, made under authority to sell, if made as a means and with the present intention of such an appropriation, would suffice; no demand on him was necessary, and flight, concealment, and evasion are facts evidencing a fraudulent intent. *Id.*

7. See this case for evidence held legitimate and sufficient in the prosecution of a cotton-yard keeper, for embezzlement of cotton alleged to be the property of a national bank. *Id.*

ESTRAY LAW.

1. "Unlawfully taking up and using an estray," omitting the clause "without complying with the laws regulating estrays," is no description of an offence. *Riviere v. State*, 55.

2. An estray is a subject of theft, and it is no defence that the estray was delivered to the accused by a person who had taken it up, but had not estrayed it. *Owens v. State*, 470.

EVIDENCE.**ACCOMPLICE TESTIMONY.**

EVIDENCE—Continued.**BURDEN OF PROOF.****CONFESSIONS.****FACT CASES.****PRACTICE, 4.****VARIANCE.****WITNESS.**

1. Under the original Penal Code, the wilful killing, etc., of certain animals, with intent to injure the owner, was punishable by fine of not less than three nor more than ten times the amount of the injury done the owner. The State was not bound to prove the killing of the entire number alleged, but of so many only as warranted the fine assessed by the jury. *Street v. State*, 5.

2. Evidence of other offences is competent to show the motive or intent of the offence on trial, when the motive or intent is a substantive constituent of the latter. *Id.*

3. When an indictment includes minor offences, evidence of such minor offences is admissible. *Moore v. State*, 14.

4. Not allowable on cross-examination to interrogate the witness on collateral or irrelevant matters, merely to lay a basis for contradicting or discrediting him; but full inquiry into his relation to the parties and the subject-matter, his interest, means of knowledge, and the like, should be allowed. The extent to which the feelings and motives of a witness may be probed is practically submitted to the discretion of the presiding judge. *Stevens v. State*, 39.

5. If the brand on a stolen animal be the only evidence of ownership, the record of the brand must be proved; but ownership or identification may be proved otherwise than by the brand. *Hutto v. State*, 44.

6. Proof that the deceased was a violent and dangerous man is not material in a trial for murder, unless it appeared from the evidence that he made hostile demonstrations against the defendant. *Frye v. State*, 94.

7. A witness for the defence having named certain persons as present at a horse-trade, the prosecution asked him where they were when he last heard of them. *Held*, allowable on cross-examination. *Jones v. State*, 103.

8. At the instance of the jury, a witness may be recalled to repeat his testimony on a particular point, but he must not be allowed to give new testimony. *Edmondson v. State*, 116.

9. The testimony of belligerents cannot be presumed to be better evidence of what transpired in an exciting *rencontre* than that of by-standers. *Lanham v. State*, 126.

10. Dying declarations are evidence only in trials wherein the death of the declarant is the subject of the charge, and the circumstances of his death the subject of the declarations. *West v. State*, 150.

11. There being proof that the deceased, when shot by the accused, had a pocket-knife in his hand, the defence proposed to prove that at a subsequent but indefinite hour of the same day the accused was seen a mile or more from the place of the homicide, with a fresh cut in the lapel of his coat. *Held*, properly excluded. *Id.*

12. Uncommunicated threats are not material evidence for the defence

EVIDENCE — Continued.

in a murder case, unless it be shown that the deceased, when killed, was making hostile demonstrations. *Williams v. State*, 163.

18. In a trial for keeping a liquor-shop open on an election day, evidence that the judges of election permitted it was not competent. They are empowered to close such shops, but not to allow them kept open. *English v. State*, 171.

14. When a pardon is relied on to restore the competency of a witness, the charter of pardon is the best and the proper evidence. *Cooper v. State*, 194.

15. Incompetency of a witness by conviction of felony should be shown by the judgment of conviction. *Id.*

16. Collateral facts raising no reasonable presumption or inference affecting the issue are not evidence, — *e.g.*, that an adverse witness had been prosecuted for crime. Nor, in general, is the character of the person injured admissible, unless it is part of the *res gestæ*. *Id.*

17. The fact that a resident witness went out of the State a few days before the trial does not warrant the introduction of his testimony at a previous trial. *Id.*

18. No rule constrains a jury to believe an unimpeached witness, or to disbelieve an impeached one. The credibility of testimony is for their determination, not arbitrarily, but in view of all the evidence, the manner of the witness, etc. *Id.*

19. On the issue of guilty or not guilty, the burden of proof never shifts from the State to the defendant. *Shafer v. State*, 239.

20. Confessions made in arrest are evidence against the maker, if he made them voluntarily, after being cautioned that they might be used against him. *Id.*

21. No inflexible rule determines the admissibility of a confession made after a previous one had been obtained by improper means. If doubtful whether the improper influence still operated so as to impair the spontaneity of the last confession, it should be excluded. *Walker v. State*, 245.

22. In a trial for murder, the State, was allowed to prove that the examining magistrate made the accused impress his footprints in an ash-heap, and that they corresponded with those found where the murder was committed. *Held*, not error, nor violative of the constitutional guaranty that no one shall be compelled to give evidence against himself. *Id.*

23. The circumstances of a previous difficulty between the defendant and the deceased are evidence for the State in a trial for murder, to show the *animus* of the homicide; and they may be competent for the defendant as explanatory of his acts. *Marnoch v. State*, 269.

24. Hearsay evidence is none the less incompetent because no other or better can possibly be obtained. *Reeves v. State*, 276.

25. In a trial for horse-theft, the State proved that the purchaser of the animal from the defendant had not been indemnified by him. *Held*, error to exclude evidence for the defendant that he had offered to indemnify the purchaser. *Sigler v. State*, 283.

26. In cases dependent on circumstantial evidence alone, greater latitude is allowed in the presentation of it than when direct and positive testimony is relied on. In such cases, strange conduct or unwonted agitation

EVIDENCE — Continued.

and emotion of the accused may be
tion. *Noftsinger v. State*, 301.

27 Concealment of knowledge th
not make the party concealing it an
tate corroboration of his testimony.

28. Evidence may be admitted at
cluded, if deemed "necessary to a d
singer v. State, 301.

29. Proof of the facts which, unde
a negro marriage is not proof by '
Penal Code in prosecutions for unla
riage consummated by that Consti
accused and his former wife were li
this State on March 30, 1870, when
Steward v. State, 326.

30. On his trial for aggravated as
her if she did not testify on a former
sexual intercourse with her. *Held*,]
also objectionable because violative
v. State, 329.

31. In a trial for rape, the prosec
illicit intercourse with any one other
342.

32. A confession made in arrest i
been voluntary, and that, before it
cautioned that his statements coul
State, 363.

33. If property was stolen from t
for the owner, the State must prove
the taking; and this proof should l
accounted for, before resorting to
of his consent. *Id.*

34. Not error to admit oral proof
ant's receipts for certain cotton, mea
in which the indictment alleged th
Leonard v. State, 417.

35. In the trial of a bailee for e
competent for the State to prove t
and evidence of a qualified owners
trol, sufficed to sustain a general all
rulings on evidence in this case, and
is sustained. *Id.*

36. When the State has been a
prisoner said about his possession
should have been permitted to expl
cumstance, or of any declaration o
afterwards, tending to impair or des
But to render his declarations co
exceptions to the general rule that
self. *Shrivers v. State*, 450.

EVIDENCE — Continued.

37. Statements of an uncautioned prisoner cannot be made evidence against him by proof that, while he was still in custody, they were repeated in his presence and he made no reply. *Id.*

38. Proof of handwriting by comparison is expressly authorized by the Code, but this does not enhance the value of this species of evidence, which has always been considered feeble. Note evidence of this character relied on to corroborate an accomplice witness in a trial for murder, and held insufficient. *Jones v. State*, 457.

39. To support a capital conviction, more is necessary than a strong suspicion or probability. The evidence must, to a moral certainty, engender the conclusion of guilt beyond every other reasonable hypothesis. *Id.*

40. To warrant a conviction for obstructing a railroad track, the proof must show that the obstruction might have endangered human life, which is the gist of the offence. See evidence held insufficient in this case. *Bullion v. State*, 462.

41. One accomplice cannot corroborate another. *Heath v. State*, 464.

42. The rule that the evidence must correspond with the allegations and be confined to the point in issue does not exclude evidence which, though insufficient of itself, constitutes a link in the chain of proof. *Francis v. State*, 501.

43. When proof of guilty knowledge or intent is necessary, it is competent to prove relevant facts, though they are merely collateral or are themselves constituents of a distinct offence. See illustration in a trial for land-forgery. *Id.*

44. A detective who feigned complicity with the offender is not an accomplice witness. *Wright v. State*, 574.

45. The suppression of a legitimate question was not a material error when it is apparent that it could have elicited no new testimony, and that the defendant suffered no prejudice. *Burt v. State*, 578.

46. A law which allows a conviction on less or different evidence than was necessary when the offence was committed is *ex post facto*. See the illustrations in these cases. *Calloway v. State*, 585; *Hannahan v. State*, 664.

47. In a trial for theft, the want of the owner's consent may be proved by circumstantial evidence of a conclusive character. That he instituted search for the property is a cogent circumstance. *Rains v. State*, 588.

48. In a trial for unlawful marriage, the proof must show a valid marriage of the defendant, and his or her subsequent marriage during the life of the lawful spouse. Divorce, or five years' absence of the spouse, would seem to be matter of defence. See this case on evidence and presumption in such trials. *Hull v. State*, 593.

49. See a case of theft in which the defendant should have been allowed to prove his own declarations and acts as part of the *res gestæ*. *Turner v. State*, 596.

50. Indictment for theft of cattle alleged the ownership in one F., who testified they were his sister's but were in his possession and control, with authority to sell them, and that he held her power of attorney; but no power of attorney was produced. *Held*, that the ownership was well alleged in F., and his testimony, without the power of authority, was properly admitted. *Id.*

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EVIDENCE — *Continued.*

51. In the trial of a white woman for unlawful marriage witness's opinion that "she looks like a white woman" do prove that she was a white woman. *Moore v. State*, 608.

52. In the separate trial of a defendant jointly indicted an assault with intent to murder, the principal State's witness's acts and declarations of one of the others in bringing conflict, before the defendant on trial came on the ground. Defence to exclude this evidence was overruled by the court in error, inasmuch as evidence was afterwards adduced of a concert of action between all the indicted parties to bring *Baker v. State*, 612.

53. Defendant asked a State's witness if she had not been at a place stated, said that the defendant was a rascal and wanted to see him go to the penitentiary; to which the witness made the objection that the witness had already said that her husband and the deceased were unkind. *Held*, error; the defence should have been allowed to probe the *animus* of the witness. *Mason v. State*, 613.

54. It is competent to prove that a witness has made statements in court contrary to his testimony at the trial. See the illustration case. *Butler v. State*, 635.

55. A State's witness denied that he had offered his assistance in the offence. *Held*, competent to contradict him. *Id.*

56. Not necessary to corroborate an accomplice witness's testimony in detail. Sufficient if there be "other evidence tending to connect the defendant with the offence committed." *Myers v. State*, 636.

57. In a trial for theft, defendant's declarations at the time of the offence, explanatory of his intent or purpose, are evidence in his favour. *Id.* *v. State*, 659.

58. In a trial for theft of his own property, the defendant is allowed to prove any fact which may legitimately tend to show fraudulent intent, — as, for instance, the discharge of a debt which he had pledged the property as security. *Id.*

59. An accomplice cannot corroborate his own testimony. *Id.* *v. State*, 664.

EX POST FACTO LAW.

1. A law which assumes to warrant a conviction on evidence less than was necessary when the offence was committed is *ex post facto*. *Calloway v. State*, 585.

2. Art. 426 of the Revised Code of Criminal Procedure provides that "where property is owned in common, or jointly, by two or more persons, the ownership may be alleged in either or all of them." A new provision, and, with reference to offences committed before it took effect, is *ex post facto* and inoperative. *Hannahan v. State*, 586.

3. The Revised Code of Criminal Procedure provides that a person sentenced to the penitentiary, adjudged at the same term of court as another, and that each subsequent term shall begin at the expiration of the preceding one; but this would be *ex post facto* if enforced against offences committed before its enactment. *Id.*

EXTRADITION.

The right of bail does not obtain in extradition cases. *Quære*, whether an appeal lies from the order of a district judge on *habeas corpus*, remanding into custody a party detained under an extradition warrant. But if it does, the right of bail does not obtain, pending the appeal. *Ex parte Erwin*, 288.

F.**FACT CASES.**

1. See proof held too inconclusive to establish a felonious intent, in a trial for theft. *Clark v. State*, 56.
2. Facts sufficient to show that a brand was altered with a fraudulent intent. *Slaughter v. State*, 123.
3. Evidence held sufficient to support a conviction for murder in the first degree. *Lanham v. State*, 126; *Smith v. State*, 414.
4. Evidence held sufficient to support a conviction for disturbing public worship. *Friedlander v. State*, 204.
5. Evidence which sustains a conviction for aggravated assault with a knife, though the accused neither struck with it nor was prevented from doing so. *Johnson v. State*, 210.
6. Evidence held too inconclusive to identify the accused as the perpetrator of a cattle-theft. *Curry v. State*, 267.
7. Purely circumstantial evidence held to sustain a conviction for murder in the first degree. *Noftsinger v. State*, 301.
8. Conviction for theft sustained, in deference to the finding of the jury, though the State's witness who identified the property was contradicted by several for the defence. *Calhoun v. State*, 340.
9. Evidence which, in a trial for murder, required that the law of manslaughter be given in charge to the jury. *Williams v. State*, 396; *Shricers v. State*, 450.
10. Evidence held insufficient to support a conviction for murder in the first degree, because an accomplice witness was not satisfactorily corroborated. *Jones v. State*, 456.
11. Evidence held insufficient to sustain a conviction for obstructing a railroad track, because not showing that the obstruction might have endangered human life. *Bullion v. State*, 462.
12. Evidence held insufficient in the prosecution of a woman for unlawful marriage with a negro, — a witness's opinion that "she looks like a white woman" being the only proof that she was such. *Moore v. State*, 608.

FILE-MARKS.**VERDICT, 7.**

1. If an information and its supporting affidavit be attached to each other, or if both be written on the same sheet of paper, a single file-mark on the outside fold is a substantial compliance with the requirement that the affidavit "shall be filed with the information." *Schott v. State*, 616.
2. Objection that the affidavit was not filed is not available primarily by motion in arrest of judgment, but must be taken *in limine*. *Id.*

INDEX.

FORGERY.

1. Sect. 5 of the act of 1876, "to provide for viction of all forgers of land-titles," makes ext amenable, and authorizes their indictment "by th County, or in the county where the offence was county where the land lies about which the offence mitted." *Held*, germane to the title of the act, other respects. *Francis v. State*, 501.

2. No matter where the offence against said ac grand jury of Travis County is empowered to indict of said county to try the offender. *Id.*

3. In a trial for forgery of a transfer from S. to B erly allowed, in proof of guilty knowledge and in conveyance to S. from one T., and prove that it and to it were forgeries. *Id.*

4. The charge of the court, however, should ha against treating such evidence as proof of the *corpus*

FORMER ACQUITTAL.

1. Former acquittal is no defence against a charge could not have been convicted in the previous p *State*, 78.

2. The wilful killing, etc., of certain animals, with owner, being a different offence from the wilful and of such animals, an acquittal of the one is no defence for the other. *Id.*

3. The verdict must expressly find whether a spe conviction or former acquittal is true or untrue. *Bro*

H.

HABEAS CORPUS.

1. In all *habeas corpus* cases, the mandates of this co on the parties, and are not transmitted to inferior tr ment. Unless the liberty of the applicant is restrain respondent amenable to the process of this court, and nizance. *Ex parte Coupland*, 26 Texas, 387, explained 288.

2. The Revised Code of Criminal Procedure empo ing a hearing on *habeas corpus*, to bail the prisoner fi this power expires with the determination of the case.

3. *Quære*, whether a party detained under an extr who on *habeas corpus* before a district judge has be today, has an appeal to this court. If so, he is not e appeal, to go at large on bail or otherwise. *Id.*

4. On motion of appellants, this court dismissed judgment on *habeas corpus*, but they filed a second t quent term, and claimed a decision on the merits. proceeding is without authority of law, and it is di the State. *Ex parte Jones*, 365.

I.

IDEM SONANS.

1. "Janury," in an indictment, held *idem sonans* with *January*. *Hutto v. State*, 44.
2. "Whiteman" held *idem sonans* with *Whitman*. *Henry v. State*, 388.

ILLEGAL PRACTICE OF MEDICINE.

1. Medical practitioners must have a certificate of qualification, except those who for five consecutive years prior to January 1, 1875, were regularly engaged in the general practice of medicine in this State. *Hilliard v. State*, 69.
2. A certificate of qualification conforming to the act of 1876 must be held by all practitioners except the said veteran class and those who have certificates under the previous act of 1873. *Id.*
3. A certificated physician, before engaging in practice, must furnish the district clerk of his county with the certificate and have it recorded, as required by the act of 1876. If a physician certificated under the act of 1873 removes to another county, he must have his certificate recorded there before engaging in practice. *Id.*
4. The object of the act is protection against quacks, and its construction should accord with its purpose. *Id.*

INDICTMENT.

AMENDMENT.

INFORMATIONS.

THEFT, 11.

VARIANCE.

1. Indictment for unlawful purchase of public land charged that the defendant, a county surveyor, did, on a certain day, "deal in land-certificates of the State of Texas, and was then and there interested and concerned in the purchase and sale of an interest in the public lands of the State of Texas, contrary to law," etc. *Held*, bad for uncertainty, and because county surveyors were not prohibited by the original Penal Code from dealing in public lands. *Gray v. State*, 10.
2. An indictment is fatally defective if it fails to allege that the defendant "did" the acts constituting the offence. *Moore v. State*, 42.
3. Bad spelling does not vitiate an indictment, — *e.g.*, "Janury" for January. *Hutto v. State*, 44.
4. That an indictment fails to show that it was presented in the proper court is not a substantial objection; but if true, and not cured by amendment, is good cause on motion to quash. *Walker v. State*, 52.
5. The requirement that the presentment of an indictment in open court by the grand jury should be entered on the minutes should not be neglected. *Id.*
6. If a statute makes it penal to do this *or* that, mentioning several things disjunctively, all the prohibited acts may be charged in a single count; but the conjunction *and* must be used in lieu of the disjunctive *or* employed in the statute. *Copping v. State*, 61; *Slawson v. State*, 63.
7. Recital that "the grand jurors of the State of Texas, duly empanelled, charged, and sworn to inquire of offences committed in the county

INDICTMENT — *Continued.*

of M., upon their oath present," etc., suffices to show that the indictment is the act of the grand jurors of said county, summoned from the body thereof. *Coker v. State*, 83; *Scales v. State*, 861.

8. The Constitution of 1876 abrogated the requirement that an indictment must show that it was presented in a court having jurisdiction to try the offence, and the Revised Code of Criminal Procedure conforms to the change. *Id.*

9. No standard of penmanship has been prescribed for criminal pleadings. *Irvin v. State*, 109.

10. Indictment for preventing or defeating execution of civil process, or for resisting or opposing an officer in its execution, must allege the particular mode in which the offence was committed, and the defendant's knowledge of the capacity in which the officer was acting. *Horan v. State*, 183.

11. *Quære*: Should the process be set out in *hæc verba*? *Id.*

12. Indictment for burglary must expressly allege the intent. *Reeves v. State*, 276.

13. Indictment for assault with intent to murder should allege whom the accused intended to murder, and not leave that to be inferred from the allegation of assault. *Wimberly v. State*, 329.

14. Under the Code of this State, an indictment is good if, eliminating surplusage, it so avers the constituents of the offence as to apprise the defendant of the charge against him, and to enable him to plead the judgment in bar of another prosecution for the same offence. What need not be proved need not be alleged. *Mayo v. State*, 842.

15. A misnomer in an immaterial allegation does not vitiate an indictment. See illustration in an indictment for rape. *Id.*

16. A common-law indictment for murder is substantially good in this State; but not so a common-law indictment for manslaughter. *Jennings v. State*, 850.

17. Indictments for perjury need not conform to common-law precedents, but are substantially good if they charge the constituents of the offence in plain and intelligible words. *Bradberry v. State*, 875.

18. The name of the injured party must be alleged, if known; but one acquired by reputation, or one which is *idem sonans* with his true name, suffices. See illustration in this case. *Henry v. State*, 888.

19. Indictment for perjury alleged the material inquiry to have been whether one H. or one W. killed a certain steer, and charged that thereon the accused falsely swore that he "saw W. kill the steer about four months ago;" and traversed this by the averment that the said W. "did not kill said steer at the time and place alleged" by the accused. *Held*, bad, because the traverse negatives the time but not the fact that W. killed the steer, and, as the time was not material, assigns the perjury on an immaterial statement. *Martinez v. State*, 894.

20. One cause for setting aside an indictment is the presence of any unauthorized person when the grand jury "were deliberating upon the accusation against the defendant, or were voting upon the same." The prosecuting attorney is "an unauthorized person." See the case in full on this subject. *Rothschild v. State*, 519.

INDICTMENT — Continued.

21. Indictment may, in a single count and without duplicity, charge the murder of two or more persons by the same act. *Rucker v. State*, 549.

22. Proper practice in supplying a lost indictment. *Turner v. State*, 596.

23. Issuable allegations should be directly and certainly averred, and not be introduced by way of argument or inference. *Moore v. State*, 608.

24. In a prosecution of a white woman for unlawful marriage with a negro, the marriage was an essential element of the offence, and should have been directly averred. *Id.*

25. Indictment for burglary must allege that the entry was effected by force, threats, or fraud, and without the free consent of the occupant, or of some one authorized to consent. The phrase "with force and arms" does not supply these allegations, and is unnecessary. *Brown v. State*, 619.

26. And the indictment must set forth the offence with intent to commit which the burglarious entry was done. *Id.*

INFANTICIDE.

MURDER, 28.

INFORMATIONS.**INDICTMENT.**

1. Violations of the election law of 1876 are prosecutable by information as well as indictment. *Haines v. State*, 30.

2. Affidavit for an information sustained which stated in its caption the proper county and the State, and referred thereto for the venue of the offence. *Strickland v. State*, 34.

3. Note an affidavit and information which may be objectionable for duplicity, but not for charging different offences. *Id.*

4. Variance between the date of the offence as alleged in the affidavit and as charged in the information vitiates the whole proceeding. *Swink v. State*, 74.

5. No standard of penmanship has been prescribed for criminal pleadings. The supporting affidavit may be referred to for the purpose of solving a doubtful letter in the information. *Irvin v. State*, 109.

6. Since the adoption of the Revised Codes, informations for unlawfully carrying weapons need not negative the defendant's exemption under the exceptions. *Lewis v. State*, 567.

7. If an information and its supporting affidavit be attached to each other, or if both be written on the same sheet, and the clerk's file-mark be put upon the outside fold, it complies with the requirement that the affidavit "shall be filed with the information." *Schott v. State*, 616.

8. Objection that the affidavit was not filed must be raised *in limine*, and comes too late in the motion in arrest of judgment. *Id.*

INSANITY.

In a trial for murder, the court below instructed the jury that an act done in a state of insanity is not punishable, and that the true inquiry is whether the accused was capable of having, and did have, a criminal intent and the capacity to distinguish between right and wrong in respect of the act of which he is charged. *Held*, in substantial accord with the adjudications on the subject. *Williams v. State*, 168.

JUDGMENT.

Costs.

JURISDICTION.

FORGERY.

VENUE, 3.

1. The County Courts have jurisdiction of all misdemeanors cognizable by

2. Unless the applicant for habeas corpus when he invokes the jurisdiction of the court. *Ex parte Erwin*, 288.

3. *Quære*, whether appeal lies from a writ of habeas corpus, remanding into custody without a writ. *Id.*

JURORS AND JURY.

CHALLENGE TO THE ARRAY, AND
OATH TO JURY.

1. Separation of a jury is not a ground for challenge in a criminal case, unless it impaired the fairness to the defendant. *Cox v. State*, 1.

2. Failure of the jury-commissioner to select a jury is not cause for challenge to the array, and does not constitute error on appeal, without a showing of prejudice. *Coker v. State*, 83.

3. That a talesman was summoned in violation of the prohibition of the constitution is no cause for challenge; and when summoned peremptorily, his participation in the selection of the jury is nothing impugning the fairness of the trial.

4. A juror already accepted cannot be challenged. *Id.*

5. When there was no residuum of regular jurors challenged for cause, the court is not accused to pass upon those in the pool of summons of qualified persons. *Wesley v. State*, 142.

6. The jury law intends that the jury be selected in a practicable, without resorting to talesmen.

7. The separation of the jury does not constitute error, even in a felony case. *Id.*

8. Conscientious scruples on capital cases of circumstantial evidence, are not a ground for challenge. *Shafer v. State*, 239.

9. Note the strictures in the opinion of the court on the conduct of jurors. *Marnoch v. State*, 142.

10. The record must show that the jury was properly selected, and will be set aside. *Kennon v. State*, 142.

11. See this case *in extenso* on the question of the jury, and for the criterion thereof. *Roth v. State*, 142.

JURORS AND JURY — Continued.

12. When not otherwise provided, the provisions of the Revised Statutes prescribing the qualifications of jurors, exemptions from jury-service, etc., apply in criminal as well as in civil trials. A petit juror, therefore, who had served on the trial of a party indicted as a *particeps criminis* of the defendant was subject to challenge for cause. *Dunn v. State*, 600.

18. No length of previous service at the pending term disqualifies a petit juror. The word *preceding* in the jury law of 1876 has reference to a prior term of the court. *Myers v. State*, 640.

JUSTICES OF THE PEACE.

County Courts have concurrent jurisdiction with justices of all misdemeanors cognizable by the justices' courts. *Chaplin v. State*, 87.

M.**MALICE.**

It is not all homicide, but all murder, committed in the perpetration, or attempt at the perpetration, of robbery, rape, arson, or burglary, which is made murder in the first degree by the Penal Code. Malice, therefore, either express or implied, is an element of murder so committed. *Pharr v. State*, 472.

MALICIOUS MISCHIEF.

1. Under the original Penal Code, the punishment for the wilful killing, etc., of certain animals, with intent to injure the owner, was by fine of not less than three nor more than ten times the amount of injury done the owner. The State is not bound to prove the killing of all the animals alleged in the information, but of enough to warrant the fine assessed in the verdict. *Street v. State*, 5.

2. Recital in a recognizance that the defendant is accused of "malicious mischief" is not sufficient, inasmuch as there is no such specific offence defined in the Code as "malicious mischief." *Killingsworth v. State*, 28.

3. Wilful killing, etc., of certain animals, with intent to injure the owner, being a distinct offence from the wilful and wanton killing, etc., of such animals, an acquittal of the one offence is no defence against a prosecution for the other. *Irvin v. State*, 78.

4. In a trial for malicious mischief by pulling down another's fence without his consent, the inquiry as to the possession was properly restricted to the actual, quiet, and peaceable possession. The right of possession incidental to the title to the land could not become an issue. *Jenkins v. State*, 146.

MANSLAUGHTER.**MALICE.****MURDER.**

1. Though a common-law indictment for murder is substantially good in this State, one for manslaughter is not. See the opinion *in extenso* for the distinctions between manslaughter at common law and manslaughter under the Penal Code. *Jennings v. State*, 850.

MANSLAUGHTER — Continued.

2. If in a trial for murder the evidence tends, by any legitimate deduction, to make a case of manslaughter, the law of manslaughter must be given in charge to the jury. If the necessity for the charge be doubtful, it should be given. See these cases in illustration. *Williams v. State*, 396; *Shrivers v. State*, 450.

8. The question of "adequate cause" is one for the jury, under proper instructions from the court. *Id.*

MARKS AND BRANDS.

ALTERING CATTLE-BRANDS.

THEFT, 2.

MARRIAGE.

UNLAWFUL MARRIAGE.

MINUTES OF COURT.

1. The entry on the minutes of the presentment of the indictment in open court by the grand jury is a duty which should not be neglected; and this entry should be comprised in a district clerk's certificate of transfer in a misdemeanor case. *Walker v. State*, 52.

2. The record must show that the defendant pleaded to the indictment, or that a plea was entered for him. *Morehead v. State*, 126.

3. After an appeal has been taken, the minutes cannot be so amended as to show that the defendant pleaded. *Knight v. State*, 206.

4. The minutes of a former term may be amended *nunc pro tunc*, so as to recite the due presentment of the indictment. Note in this case the parol evidence adduced for the purpose, but held insufficient. *Cox v. State*, 495.

5. To supply the loss of an indictment, the record must show not only the suggestion of loss and the leave to substitute, but also that the substitution was in fact made. Presumptions do not avail to verify the substitute; but the entries may be amended *nunc pro tunc*, even at a subsequent term. *Turner v. State*, 596.

MISNOMER.

IDEM SONANS.

INDICTMENT, 15.

VARIANCE, 8.

MURDER.

CONFESSIONS.

INSANITY.

MANSLAUGHTER.

SELF-DEFENCE.

1. Convicting the defendant of murder in the second degree, the jury assessed his punishment at ninety-nine years in the penitentiary, which is complained of as oppressive. *Held*, a matter which the law confided to the discretion of the jury. *Frye v. State*, 94.

2. See evidence held sufficient to support a conviction for murder in the first degree. *Lanham v. State*, 126.

3. The Constitution of 1876 wholly superseded that of 1869, and abro-

MURDER — Continued.

gated the provision of the latter which empowered juries to substitute life imprisonment in lieu of the death penalty in capital cases; but it retained in force the antecedent statutory penalty of death for murder in the first degree until the Revised Penal Code took effect and enacted that the punishment for murder in the first degree is "death or confinement in the penitentiary for life." *Hunt v. State*, 212.

4. In trials for murder wherein the inculpatory evidence is purely circumstantial, the charge must expound the rule in *Webster's Case*, — that is, that the facts must be inexplicable except by the hypothesis of guilt, be consistent with each other and the main fact, and each be established by evidence as cogent as if it were the main fact. This is not a charge on the "weight of evidence," nor is it supplied by the usual instruction on reasonable doubt. *Id.*

5. Instructions on murder will not err if the language of standard authorities be adhered to, without effort at novel expositions of the law. *Id.*

6. The change made in the punishment for murder in the first degree by the Revised Penal Code does not, by retroactive operation or otherwise, invalidate antecedent convictions pending on appeal. *Walker v. State*, 245.

7. Evidence that the examining magistrate compelled the accused to make his footprints in an ash-heap, and that they corresponded with footprints found where the murder was committed, was competent for the State, and not violative of the constitutional guaranty that no one shall be compelled to give evidence against himself. *Id.*

8. The circumstances of a previous difficulty between the defendant and the deceased are evidence for the State to show *animus*, and may be competent for the accused as explanatory of his acts. *Marnoch v. State*, 269.

9. Appellant was tried since the Revised Codes took effect, for a murder committed prior thereto, and elected to receive, if convicted, the punishment in force when the offence was committed. The jury returned a verdict of guilty of murder in the first degree, and the court adjudged the penalty of death. *Held*, correct. *Noftsinger v. State*, 301.

10. See evidence of purely circumstantial character held to sustain a conviction for murder in the first degree. *Id.*

11. A common-law indictment for murder is substantially good in this State, inasmuch as the elements and definition of murder under the Penal Code are essentially the same as at common-law. Otherwise as to manslaughter. *Jennings v. State*, 350.

12. The court should not indicate to the jury a preference between the alternative punishments for murder in the first degree prescribed by the Revised Code. *Doran v. State*, 385.

13. In a trial since the Revised Code took effect, the verdict found the defendant guilty of murder in the first degree, but assessed neither death nor confinement in the penitentiary for life. *Held*, insufficient to support a judgment. Note the distinction between the penalties prescribed by the Code for this offence and the provision of the Constitution of 1869 on the subject. *Id.*

MURDER — Continued.

14. In a trial in B. County deceased had stolen a horse in B. County with the horse, was attempting to arrest him with irrelevant; for though theft through which the stolen property the commission of theft "in the defendant, so as to authorize his arrest. *Lacy v. State*, 408.

15. A charge on murder in warrants a conviction without a finding. *Shrivers v. State*, 450.

16. To support a capital conviction suspicion or probability of guilt, engender the conclusion hypothesis. *Jones v. State*, 457.

17. See evidence of handwriting of an accomplice witness.

18. As it is not all homicide, but attempt, or attempt at the perpetration, which is made murder in the face of malice, either express or implied murder so committed. *Pharr v.*

19. A question by the prosecutor deceased "appeared to have been the witness, but for a fact, and was

20. See this case in full upon the trial for murder, and for the testimony challenge is well grounded, and the exhausted, it is error to overrule

21. Indictment may, in a single murder of two or more persons by

22. There being evidence of the on account of the latter having been to put in evidence an indictment and also an indictment against deceased was surety. *Held*, admitted defendant. *Id.*

23. If a woman, with a sedate birth of her child, formed the design was complete and the child took its life, it was murder with *Wallace v. State*, 570.

24. But if her design was formal or mental anguish, was incapable of the ability to consider and decide, and she conceived and perpetrated after the child was wholly born degree. *Id.*

MURDER — Continued.

25. If the jury could have concluded from the evidence that the defendant killed her child before its birth was complete, or that she caused its death by means which she used merely to assist her delivery, the court should have instructed for acquittal in case they so found. *Id.*

N.**NEWLY DISCOVERED EVIDENCE.**

NEW TRIAL, 2, 4, 5, 6.

NEW TRIAL.

1. Separation of a jury is not cause for new trial, even in a capital case, unless it is probable that it impaired the fairness of the verdict or wrought injustice to the defendant. *Cox v. State*, 1.

2. New trial will not be granted on account of newly discovered evidence which is merely cumulative. Defendant must bring his application within the established rules. *Hutto v. State*, 44.

3. Separation of the jury is not necessarily cause for new trial, even in a felony case. *West v. State*, 150.

4. Newly discovered evidence to prove threats of the deceased against the defendant, not communicated to the latter before the homicide, is not cause for new trial, unless there be some proof that the deceased, when killed, was making some hostile demonstration. *Williams v. State*, 163.

5. Nor would such evidence to prove a criminal intimacy between the deceased and the wife of the defendant be material, without proof that the intimacy came to the defendant's knowledge, and that immediately thereupon he sought the deceased and killed him. *Id.*

6. Application for new trial based on newly discovered evidence must allege that the evidence was unknown to the defendant at the time of the trial, and not merely that it was unknown to his counsel; and if the supporting affiants allege information derived from other persons, the names of such persons should be disclosed, and their affidavits be filed, or the want of them accounted for. *Id.*

7. Motions for new trial must comply with the essential requirements of the law. *Id.*

8. Surprise is not cause for new trial in this State; but, even if it arises after the trial has commenced, may be cause for a continuance or postponement. *Walker v. State*, 245.

9. Being convicted of an assault with intent to murder, the defendant moved for a new trial, and filed a supporting affidavit made by the assaulted party, to the effect that the defendant cut her by accident, and that she had not intended to prosecute him. *Held*, that the motion was properly overruled, because the testimony of other witnesses supported the conviction. *Young v. State*, 461.

10. Under art. 781 of the Revised Code of Criminal Procedure, counter-affidavits may be filed in opposition to the motion for a new trial. *Reynolds v. State*, 516.

11. A new trial will be granted to enable the defendant to obtain the testimony of a co-defendant acquitted since his conviction, if shown to be

NEW TRIAL — Continued.

legal, competent, and likely to change the verdict; but the State may resist the motion by proof that the acquitted co-defendant and his testimony are unworthy of belief, and not likely to change the verdict. *Rucker v. State*, 549.

12. A "caricature" was used in the concluding argument without objection at the time, but is assigned as cause for new trial. *Held*, not available at that stage of the case. *Id.*

O.**OATH TO JURY.**

If the record fails to show that the jury were sworn, the conviction will be set aside. *Kennon v. State*, 826.

OBSTRUCTING PUBLIC ROAD.

ROAD LAW.

OBSTRUCTING RAILROAD TRACK.

1. To warrant a conviction for this offence, the evidence must show that the obstruction was such as might have endangered human life, which is the gist of the offence. *Bullion v. State*, 462.

2. The State proved the obstruction to have been a piece of railroad-iron, six or eight feet long, placed across the track, and which the State's witness removed with his hands before any train passed; but did not prove whether it was on the main track or a switch, a level or an embankment, or the usual speed of trains thereat. *Held*, insufficient to sustain the conviction. *Id.*

P.**PARDON.**

When a pardon is relied on to restore the competency of a witness who had been convicted of felony, the charter of pardon should be produced as the evidence. Art. 8110, Paschal's Digest (Rev. Code Cr. Proc., art. 732), has not changed the rule of evidence in this respect. *Cooper v. State*, 194.

PENALTY.

COSTS.

THEFT, 7.

VERDICT.

1. Unless the written law of the State prescribes the penalty for the offence, none can be inflicted. *Smith v. State*, 286.

2. Art. 423e of the former Penal Code, which prohibited the sale of liquor in quantities less than a quart and permitting it drunk on the premises, referred for the penalty to a preceding article, which was repealed in 1866. *Held*, that this rendered art. 423e inoperative, though not repealed. *Id.*

3. Within the limits prescribed by law, the amount of the punishment is for the consideration of the jury, and not that of the court. *Smith v. State*, 414.

PENALTY — Continued.

4. The Revised Code of Procedure provides that cumulative terms in the penitentiary, adjudged at the same term of court, shall be so tacked that each subsequent term shall begin at the expiration of the preceding one; but it was error to apply this provision to offences committed before the Revised Codes took effect. *Hannahan v. State*, 664.

PERJURY.

1. Indictments for perjury in this State need not conform to common-law precedents, but are substantially good if they allege the constituents of the offence in plain and intelligible words. *Bradberry v. State*, 375.

2. Allegation is necessary that the oath or affirmation was administered by a tribunal or officer lawfully authorized to administer it, but not the means whereby it was acquired. *Id.*

3. County attorneys are authorized to administer oaths to complaints cognizable by justices of the peace. *Id.*

4. Perjury may consist not only in false and corrupt testimony on the main fact at issue, but also in such testimony on material circumstances tending to prove that issue. *Id.*

5. The Penal Code provides that the "statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury." *Martinez v. State*, 394.

6. Indictment alleged the material inquiry to have been whether one H. or one W. killed a certain steer, and charged that thereon the defendant falsely swore that he "saw W. kill the steer about four months ago;" and traversed this by the averment that the said "W. did not kill said steer at the time and place" alleged by the accused. *Held*, that the traverse negatives the time but not the fact that W. killed the steer; and, as the time was not material, the perjury is assigned on an immaterial statement. *Id.*

PLEA.

1. Unless the record shows that the defendant pleaded to the indictment, or that a plea was entered for him, the conviction cannot stand. *Morehead v. State*, 126.

2. After appeal taken, the minutes cannot be so amended that they will show a plea by the defendant. *Id.*

3. Without a plea there is no issue for trial; and if one was made by or entered for the defendant, it must be affirmatively shown in the record. So obvious a requirement should not be so often overlooked. *White v. State*, 374.

4. Verdict must find whether a special plea of former conviction or former acquittal is true or untrue. *Brown v. State*, 619.

PRACTICE.

AMENDMENT.

ARREST OF JUDGMENT.

BAIL.

BURDEN OF PROOF.

CHANGE OF VENUE.

CHARGE OF COURT.

PRACTICE — Continued.**CONTINUANCE.****HABEAS CORPUS.****JURORS AND JURY.****MINUTES OF COURT.****PLEA.****SCIRE FACIAS.****SEPARATION OF JURY.****STATEMENT OF FACTS.****TRANSFER OF CAUSES.**

1. In trials involving life or liberty, especial care should be taken to prevent any separation of the jury. *Cox v. State*, 1.

2. *Quære*, whether the right of election obtains in misdemeanors. When the indictment contains but one count, and it relates to a single transaction, the defence should move to exclude any evidence which tends to prove another offence, except as proof of motive or intent in the offence on trial. *Street v. State*, 5.

3. Error in a mere matter of practice is not cause for reversal, unless obvious that it prejudiced the defendant. *Id.*

4. Premature admission of evidence is not error when its competency is shown by that afterwards adduced; nor if it was subsequently excluded from the consideration of the jury. *Moore v. State*, 14.

5. Defendant desired to call his own witness to reiterate his testimony, and, the witness having disappeared, was allowed an attachment for him, and the trial adjourned until next day, when, the witness not appearing, the court required the trial to proceed. *Held*, not error. *Id.*

6. Not allowable to cross-examine on irrelevant matters, to be used as a basis to contradict the witness; but full inquiry should be allowed into his relation to the parties and subject-matter, his interest, means of knowledge, and the like. Much control is confided to the discretion of the judge. *Stevens v. State*, 39.

7. The Revised Code and Statutes authorize the courts, by order recorded in term, to allow statements of facts to be made up, signed, and filed within ten days after close of the term, which period excludes the day of the adjournment. *Moore v. State*, 42.

8. Objection to a district clerk's certificate of transfer is not, it seems, available by motion to quash the indictment. *Coker v. State*, 88; *McDonald v. State*, 118.

9. Counsel having claimed the right to inspect a document before opposing counsel passed it to a witness for identification, the court assured him of opportunity to do so before it should be admitted in evidence, and allowed it to be passed to the witness. The opportunity to inspect it was so afforded to counsel. *Held*, that no error or prejudice is apparent. *Jones v. State*, 103.

10. If a certificate of transfer from the District Court be defective, its defects may be supplied or a new certificate procured. *McDonald v. State*, 118.

11. At the instance of the jury, a witness may be recalled to repeat his statement on a particular point, but not to give new testimony. *Edmondson v. State*, 116.

PRACTICE — Continued.

12. In a trial for misdemeanor, the court may, without charging the jury, read to them from the Code the definition and punishment of the offence. *Carr v. State*, 41 Texas, 548, *contra*, overruled. *Hobbs and Harris v. State*, 117.

13. Objections to the competency of evidence cannot be raised by asking instructions upon them to the jury. If evidence implies the existence of other and better evidence not produced or accounted for, the proper practice is to move to exclude it, and reserve exceptions if the motion is overruled. *Lanham v. State*, 126.

14. When death or imprisonment for life is adjudged, no judgment for costs should be rendered. *Id.*

15. Subject to certain prescribed regulations, the general control of criminal trials is confided to the discretion of the judges who preside thereat. *McMillan v. State*, 142.

16. Witnesses can be put under the rule at the instance of either party, and be kept under an officer or allowed to go at large as the court may direct. Wide discretion as to the manner of enforcing the rule is vested in the presiding judge, and its exercise will not be revised on appeal unless abuse of it be apparent. *Id.*; *Walling v. State*, 625.

17. Pending a motion for new trial in a case of felony not capital, the act of March 27, 1879, took effect, which authorizes sentence in such cases notwithstanding appeal taken. The motion was overruled and sentence passed, to which the defendant excepted because his conviction was prior to the said act. *Held*, that the exception was not well taken. *West v. State*, 150.

18. A verbal charge can never be given in a trial for felony, and in misdemeanors only when the parties consent. If given in a misdemeanor case, without such consent, exception must be reserved at the time. *Lawrence v. State*, 192.

19. District Court Rule 56 allows exceptions to evidence to be embodied in the statement of facts, instead of being reserved by bill of exceptions; and this rule is applicable in criminal as well as civil cases. But the exceptions must be noted and set out in the statement of facts; no intendments will be indulged. *Cooper v. State*, 194.

20. If objected to, a witness cannot be required to prove his own incompetency by reason of his previous conviction of a felony. The record of the judgment is the best and the proper proof. *Id.*

21. Pardon of a witness, relied on to restore his competency, should be proved by the charter of pardon. *Id.*

22. The invalidity or the want of an order of the District Court transferring a misdemeanor case to an inferior court is not cause for arrest of judgment. *Friedlander v. State*, 204.

23. All further proceedings in the court below are suspended by an appeal, though the term be unexpired. Its minutes cannot be amended so as to show that the defendant pleaded. *Knight v. State*, 206.

24. Recital that the judge had refused to sign a bill of exceptions does not suffice to show legal authority for by-standers to sign it. The requisites of the statute must be complied with. *Id.*

25. Objection that the minutes of court fail to show a presentment and

PRACTICE — Continued.

return of the indictment is not a judgment. *Johnson v. State*, 210

26. The district attorney being on former term, appointed an attorney at the subsequent trial term. the or new qualification, prosecuted *Marnoch v. State*, 269.

27. Note the admonition in this

28. It being often necessary to already made does not necessarily subject. *Sigler v. State*, 288.

29. Statements elicited by a party matter for the cross-examination

30. Evidence may be admitted deemed "necessary to a due administration

31. When the answer to a question subject him to a civil suit, and the court should advise him of this. *v. State*, 329.

32. Under the new rule introduced in Criminal Procedure, it seems that the time should be considered with

33. The practice of using the law to frustrate applications for continuance law seals the lips of an uncautious. *Vickery v. State*, 401.

34. When the defence requests witnesses, no relaxation of it should all the testimony. *Heath v. State*

35. After verdict it is too late of the indictment was served on should be in writing, signed and

36. Defendant is not entitled to special venire is exhausted. *Id.*

37. When a verdict of conviction presence is necessary, but not that

38. The minutes of a former trial be made to show the due preservation evidence held not to be of sufficient amendment. *Cox v. State*, 495.

39. The status of a case after trial court is the same as though therefore, a motion to set aside does not appear of record comes guilty at the first trial. *Id.*

40. A motion to set aside an order court of the matter alleged, and by oath. When the cause alleged son with the grand jury "when

PRACTICE — *Continued.*

tion against the defendant, or were voting upon the same," its verity may be shown by proof *dehors* the record. To overrule the motion, if made in time, without giving the defendant an opportunity to prove his allegation, is error. *Rothschild v. State*, 519.

41. See this case, also, on the challenge of a petit juror for bias, and the criterion of the disqualifying opinion. *Id.*

42. Severance of defendants is possible only when two or more are jointly indicted. If several are separately indicted for the same offence, neither has a right to have another tried before himself; but the trial court may so order on motion, and its action thereon is not revisable. *Rucker v. State*, 549.

43. Counter-affidavits are admissible to refute diligence, in resistance to a motion for a continuance. *Id.*

44. Judges are expressly inhibited from summing up or commenting on the evidence when ruling on a motion for new trial, but when no prejudice to the defendant is discoverable, a conviction will not be reversed on this ground. *Rains v. State*, 588.

45. For proper practice in supplying a lost indictment, see *Turner v. State*, 596.

PRACTICE IN THE COURT OF APPEALS.

TRANSCRIPT.

1. The charge to the jury is construed in its entirety, and not tested by the abstract accuracy of each clause. *Street v. State*, 5.

2. This court will not revise the admission of testimony pending the argument, unless it appears that the discretion of the court below in this respect was abused to the appellant's prejudice. *Moore v. State*, 14.

3. Unassigned errors in misdemeanors are not considered, except such as go to the jurisdiction or to the foundation of the case, — as, substantial defects in an indictment. *Moore v. State*, 42.

4. Refusal of a continuance will not be revised unless a proper bill of exceptions to the ruling appears in the record. *Crutchfield v. State*, 65; *McMillan v. State*, 100; *Reynolds v. State*, 516.

5. Erroneous charge in a misdemeanor case is not cause for reversal unless excepted to at the trial. *Hobbs and Harris v. State*, 117.

6. When the evidence tends to establish opposite conclusions, it is for the jury to pass upon its credibility, and, a new trial having been refused by the court below, this court will not disturb the conviction. *Slaughter v. State*, 123.

7. Express authority is conferred on this court to reform and correct the judgments of the courts below. *Lanham v. State*, 126.

8. This court cannot hold the refusal of a new trial to be error, when the motion therefor failed to comply with essential requirements of law. *Williams v. State*, 168.

9. Without a statement of facts, the applicability of the charge to the facts cannot be considered. *Lawrence v. State*, 192.

10. Unless given with consent of the parties, a verbal charge in a misdemeanor case is error, provided exception was reserved at the time. *Id.*

11. Without a statement of facts, the record is revised no further than

INDEX.

PRACTICE IN THE COURT OF APPEALS —

to see that the indictment is good, and that it is a valid jury and their verdict. *Kaskie v. State*, 202.

12. If nothing shows that requested instructions on appeal is that they were given. *Joh*

13. In *habeas corpus* cases, the mandates of the court on the parties, and are not transmitted to inferior courts; nor are such cases remandable with directions. *Ex parte Erwin*, 288.

14. *Quære*, whether an appeal lies from the order of *habeas corpus*, remanding into custody a party detained by a writ of habeas corpus. *Id.*

15. The admission of evidence pending argument is not reversible unless apparent that the court below was doing so. *Noftsinger v. State*, 301.

16. Unless the record shows that the jury was sworn, the verdict will be set aside. *Kennon v. State*, 326.

17. On motion of appellants, their appeal from the order of *habeas corpus* was dismissed by this court, and at a subsequent term they filed a second transcript and claimed a decision that no authority of law warrants this latter proceeding. *Ex parte Jones*, 365.

18. Unless signed by the presiding judge, a document purporting to be a statement of facts is not recognized as such by the court, but by counsel for both parties. *Hemanus v. State*, 371.

19. Without a statement of facts, this court on appeal cannot reverse the judgment of the court below, and matters as to bills of exception. *Id.*; *Castanedo v. State*, 582.

20. Unless the record affirmatively shows that the indictment is valid, or that, standing mute, a plea was entered, a conviction will be set aside. *White v. State*, 374.

21. In revising the refusal of a continuance, the court should consider absent testimony in the light of the evidence at the trial. *Willison v. State*, 400.

22. An appeal dismissed for want of a final judgment in this case at a subsequent day of the term, on a showing that a final judgment was rendered by the court below, is not reversible. 488.

23. The overruling of a challenge to the array without a bill of exception was not duly reserved; and unless it appears that the error was brought to the attention of the court below, it cannot be waived. *Castanedo v. State*, 582.

24. The enforcement of the "rule" for sequestration of witnesses is confided to the discretion of the judge presiding at the trial, and will not be revised unless it is apparent that his decision was erroneous. *Walling v. State*, 625.

PRESUMPTIONS.

MINUTES OF COURT, 5.

UNLAWFUL MARRIAGE, 4.

PRESUMPTION OF INNOCENCE.

Refusal to give in charge the presumption of innocence is error; mere omission to do so, when not asked, is not. *Hutto v. State*, 44; *Frye v. State*, 94.

PREVENTING EXECUTION OF CIVIL PROCESS.

Indictment for this offence should allege the particular mode in which it was committed, and the defendant's knowledge of the official character of the officer. Should the process be set out *in hæc verba*? *Horan v. State*, 188.

PRINCIPALS AND ACCESSORIES.

1. By previous concert in C. County, the defendant remained there while his confederates went to another county, stole horses there, brought them to C. County, where defendant joined them, and the party took the horses to a remote part of the State, and were there captured. *Held*, that defendant was not an accessory but a principal in the theft. *Scales v. State*, 861.

2. A defendant indicted as a principal offender cannot, under the Code of this State, be convicted as an accomplice. *McKeen v. State*, 631.

3. Accomplices under the Code of this State would in most of the States and at common law be denominated accessories before the fact, and, when not otherwise provided, the rules applicable to the latter apply also to the former. *Id.*

PUBLIC LANDS.

INDICTMENT, 1.

UNLAWFUL PURCHASE OF PUBLIC LAND.

RAILROADS.

OBSTRUCTING RAILROAD TRACK.

R.**RAPE.**

1. Sexual intercourse with a female under ten is rape, in this State, no matter what the circumstances; and the question of consent, or of force, threats, or fraud, is wholly immaterial. *Mayo v. State*, 842..

2. The prosecutrix cannot be required to testify to illicit intercourse with any one other than the defendant. *Id.*

3. Indictment alleged that, without the consent and against the will of the female named, the defendant did "violently and feloniously rape, ravish, and carnally know her." *Held*, sufficient to charge a rape "by force." *Walling v. State*, 625.

REASONABLE DOUBT.

The doctrine of reasonable doubt does not apply to the venue of the offence. *Deggs v. State*, 859.

RECOGNIZANCE.

BAIL-BOND.

SCIRE FACIAS.

1. No such an offence as "malicious mischief" being specifically defined

RECOGNIZANCE — Continued.

in the Code, the insertion or omission of that phrase is not material in a recognizance taken in a prosecution for wilful or wanton injury to certain animals. *Killingsworth v. State*, 28.

2. A recognizance which recites that the defendant is accused of two distinct offences is bad for duplicity. Note the illustration in this case. *Id.*

8. Recognizance for an appeal must bind the appellant to "abide the judgment," and not merely to "await the action," of the Court of Appeals. *Wilson v. State*, 38.

4. Sureties are responsible for their principal's appearance in the court below, after a reversal and remand of the case on appeal. *Riviere v. State*, 55.

5. "Unlawful taking up and using an estray" states no offence, omitting the clause "without complying with the laws regulating estrays." *Id.*

6. Recognizance designated the offence as "disturbing a congregation assembled for religious worship." *Held*, bad, because the disturbance is not characterized as wilfully done. *Magee v. State*, 99.

REMOVING LIVE STOCK WITHOUT OWNER'S CONSENT.

Under an indictment for theft, a conviction may be had for this misdemeanor. But before the Revised Code took effect it was necessary that the value of the animal should be alleged and proved, as the penalty was regulated thereby. *Powell v. State*, 467.

REPEAL.**PENALTY.**

1. The Revised Penal Code, by exempting travellers from the law against carrying certain deadly weapons, has repealed the previous law so far as travellers are concerned; but offences committed by travellers while the former law was in force are not condoned by the repeal, inasmuch as the Revised Code saves former offences. *Chaplin v. State*, 87.

2. The death penalty for murder in the first degree was not repealed by the Constitution of 1869. *Hunt v. State*, 212.

8. Repeal by implication is not favored; to effect it, the repugnancy must be obvious, unavoidable, and irreconcilable. Note the discussion of this subject with especial reference to the effect on previous laws of the adoption of the Revised Statutes and Codes. *Id.*

RESISTING AN OFFICER EXECUTING CIVIL PROCESS.

Indictment for this offence should allege the particular mode in which it was committed, and that the accused knew the capacity in which the officer was acting. Is it necessary to set out the civil process? *Horan v. State*, 188.

RETAILING LIQUOR.

Art. 423e of the former Penal Code, which prohibited the sale of liquor in quantities less than a quart and permitting it drunk on the premises, prescribed no penalty itself, but referred to a preceding article for the penalty. The preceding article was repealed in 1866, by an act which was itself subsequently repealed. *Held*, that art. 423e, though not repealed, became inoperative for want of a penalty. Note that the Revised Penal Code effectually provides for the offence. *Smith v. State*, 286.

ROAD LAW.

1. Overseers of first-class public roads are not only authorized, but it is their legal duty, under penalty for its neglect, to remove from the roadway any fence or other obstruction. *Schott v. State*, 616.

2. Being prosecuted for pulling down a fence without the owner's consent, the defendant proposed to prove that he was the overseer of a certain first-class public road, and in discharge of his duty removed the fence from the roadway. *Held*, error to exclude the evidence. *Id.*

RULES OF COURT.

District Court Rule 56, allowing exceptions to evidence to be embodied in the statement of facts, is applicable in criminal as well as civil cases. *Cooper v. State*, 194.

S.**SCIRE FACIAS.****BAIL-BOND.****RECOGNIZANCE.**

Scire facias should state every thing necessary in a petition as well as in a citation. It should allege the presentment of the indictment, the offence charged, the issuance of the *capias*, the arrest of the principal obligor, the execution, stipulations, and condition of his bond or recognizance, the breach of the condition, and the entry of the judgment *nisi*; and it should command the officer to cite the defendants to appear before the proper court, at the proper time, to show cause why the judgment *nisi* should not be made final. *Pearson v. State*, 279.

SEAL.

1. The seal of the District Court is necessary to its clerk's certified copy of its proceedings in cases transferred to inferior tribunals. *Walker v. State*, 52.

2. The legend "District Court, Bexar County," instead of "District Court of Bexar County," *held* to be a substantial compliance with the statutory requirement of the latter formula. *Marnoch v. State*, 269.

SELF-DEFENCE.

A charge on the right of self-defence is objectionable, and may be material error, if it limits the right of self-defence to actual danger. See facts in illustration. *Marnoch v. State*, 269; *Pharr v. State*, 472; *Richardson v. State*, 486.

SEPARATION OF JURY.

Note in the opinion the admonition on this subject. *Marnoch v. State*, 269.

SEVERANCE.

1. The provision of the Code which authorizes a severance to enable one defendant to obtain the other's testimony is based on the idea that there is no evidence against the latter, and does not contemplate that if he is convicted and appeals the other shall have a continuance until the appeal is determined. *Slawson v. State*, 63; *Myers v. State*, 640.

2. Severance of defendants is possible only when two or more are jointly indicted. If separately indicted for the same offence, neither has a right to have another tried before himself. *Rucker v. State*, 549.

STATEMENT OF FACTS.

1. The Revised Code and Statutes authorize the courts, by order recorded in term-time, to allow statements of facts to be made up, signed, and filed within ten days after the adjournment of the term; and this period excludes the day of adjournment from the ten days. *Moore v. State*, 42.

2. Approval and signature of the presiding judge are indispensable to validity of a statement of facts for any purpose. *Lawrence v. State*, 192.

3. District Court Rule 55 applies in criminal as well as civil cases, and allows exceptions to evidence to be reserved in the statement of facts; but the exceptions must be fully disclosed. *Cooper v. State*, 194; *Castanedo v. State*, 581.

4. One purpose of the requirement that the judge must approve the statement of facts is to enable him to supply omissions of counsel. *Deggs v. State*, 359.

STATUTES CONSTRUED.**CONSTRUCTION OF STATUTES.****EX POST FACTO.**

1. "Entire day," in the act of 1876 regulating elections, means the natural day, beginning and ending at midnight, and not merely the hours during which the polls are open. *Haines v. State*, 80.

2. Notwithstanding the "emergency clause" in the act of 1879 changing the times of holding the District Courts in the Twenty-second District, the *proviso* requiring the first term to be held in Comal County postponed the operation of the act, and, in the interim, the antecedent law fixed terms in the other counties of the district. *Lanham v. State*, 126.

3. An act of 1875 authorized any city in this State, by "a two-thirds vote of the city council," to accept said act in lieu of its charter. *Held*, that two-thirds of a quorum was meant. *English v. State*, 171.

SURPLUSAGE.

THEFT, 11.

T.**THEFT.**

1. The Penal Code provides that, "if the person accused of theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it was taken be wholly entitled to the possession at the time." *Held*, applicable to a renter or cropper on shares, whose contract did not entitle the landlord to exclusive possession, and who, without the latter's consent, took part of the crop before it was divided. *Bell v. State*, 25.

2. If the brand on a stolen animal be the only evidence of the alleged ownership, the record of the brand must be proved; but, irrespective of any brand, the ownership or identification may be shown by the flesh-marks or other satisfactory means. *Hutto v. State*, 44.

3. Note evidence too inconclusive to show a felonious intent. *Clark v. State*, 56.

4. In a trial for theft, a person indicted as a receiver of the stolen

THEFT — Continued.

property is not, under the Code of this State, a competent witness for the defence. *Crutchfield v. State*, 65.

5. See evidence deemed too inconclusive to identify the accused as the perpetrator of a cattle-theft. *Curry v. State*, 267.

6. See a state of case in which the accused should have been allowed to prove that he offered to indemnify the person to whom he had sold the stolen horse, in rebuttal of the purchaser's testimony to the contrary. *Sigler v. State*, 288.

7. It is error, in a trial for hog-theft, to charge as the penalty that prescribed for theft in general, instead of that specially prescribed for theft of hogs, sheep, and goats. Immaterial that the penalty assessed would be lawful under a correct charge. *Jones v. State*, 338.

8. Animals on their accustomed range are in the possession of their owner. *Deggs v. State*, 359.

9. Parties who, in pursuance of a common intent and previously formed design, act together in a theft, are all principals, whether all present or not when it is committed. *Scales v. State*, 361.

10. If the property was stolen from the possession of a person holding it for the owner, the want of that person's consent to the taking must be proved by the State; and this proof should be made by himself, or his absence be accounted for, before resort be allowed to circumstantial evidence. The charge should apprise the jury of the necessity of such proof. *Jackson v. State*, 363.

11. Indictment for theft of a mule alleged that it was the property of an owner unknown, and was taken from the possession of one D., who estrayed it and was holding it for the owner, and was taken without D.'s consent. *Held*, that the allegation that D. had estrayed the animal is surplusage, and the material allegations are that it was an estray mule, in possession of D., and taken therefrom without his consent. *Smith v. State*, 382.

12. Evidence tending to prove a *bonâ fide* purchase of the property by the accused made it the duty of the court to submit that issue to the jury, no matter what the court thought of the truth of the evidence. *Heath v. State*, 464.

13. See this case for the convictions which, under the Code of the State, may be had under an indictment for theft. *Powell v. State*, 467.

14. An estray is a subject of theft, and it is no defence that the estray was delivered to the accused by a person who had taken it up, but had not estrayed it. *Owens v. State*, 470.

15. The proof showed that the stolen cattle belonged to the wife of H., and not to him as alleged in the indictment, but that they were under his exclusive management and control, and were taken without his consent, or that of his wife so far as he knew or believed. The court refused to instruct that if the ownership was in one person and the control in another, the want of the consent of both must be shown. *Held*, correct. *Burt v. State*, 578.

16. The law of theft should be given in charge to the jury on a trial for burglary and theft. *Struckman v. State*, 581.

17. The want of the owner's consent to the taking of the property may

INDEX.

THEFT — *Continued.*

be proved by circumstantial evidence of a concluded search to be made for the property is *Rains v. State*, 588.

18. The alleged owner, one F., testified that the ter's, but in his possession and control with authority he held her power of attorney; but no power of *Held*, that the ownership was well alleged in F., sible, without the power of attorney. *Turner v.*

19. See acts and declarations of the accused h improperly excluded. *Id.*; *Taylor v. State*, 659.

20. The taking of one's own goods from a ba common law unless it operated to charge the bail under the Code of this State it seems immaterial affected the bailee. *Id.*

21. Before the Revised Codes took effect, there the indictment alleged the ownership in one person it to be in him and another, without actual person either. *Id.*

TRANSCRIPT.

Transcripts on appeals from County Courts in cases from District Courts should contain the orders indicated. *Pearson v. State*, 279.

TRANSFER OF CAUSES.

1. A district clerk's certified copy of transfer should on his minutes of the presentment of the indictment entries; and the certified copy of the proceedings Court must be authenticated by its seal. *Walker v.*

2. A clerk's certificate to the copy that "the is a true copy of the minutes of said court as regards" tially complies with the law, inasmuch as the previous minutes show all the proceedings. *Coker v. State*,

3. Objection to the certificate of transfer is not, aside an indictment. *Id.*; *McDonald v. State*, 118.

4. Plea to the jurisdiction, it seems, is the proper defects in the certificate. A new or amended certificate be obtained. *Id.*

5. The invalidity or want of an order of transfer motion in arrest of judgment. *Friedlander v. State*

6. Transcripts on appeals in transferred cases should of transfer, duly authenticated. *Pearson v. State*, 279.

U.

UNLAWFUL MARRIAGE.

1. The abrogation of the Constitution of 1869 has annulled negro marriages solemnized by sect. 27, instrument, nor exempted negroes thus married from unlawful marriage. *Steward v. State*, 826.

UNLAWFUL MARRIAGE — *Continued.*

2. Proof of the facts which, under the Constitution of 1869, constituted a negro marriage is not proof of marriage by "mere reputation," inhibited by the Penal Code in prosecutions for unlawful marriage. But to establish such a marriage, the proof must show that the accused and his former wife were living together as husband and wife, in this State, on March 30, 1870, when the Constitution of 1869 took effect. *Id.*

3. The indictment must allege and the proof show a valid marriage of the defendant, and his or her subsequent marriage during the life of the lawful spouse. Divorce, or five years' absence of the lawful spouse without knowledge by the defendant of his or her continued existence, would seem to be matter of defence. *Hull v. State*, 593.

4. The survival of the lawful spouse at the date of the subsequent marriage may be proved by circumstantial evidence, but no legal presumption can be invoked in lieu of the proof. It was error to instruct that when a person is shown to have been living at a certain date, his continued existence will be presumed for seven years thereafter, and that a party asserting his death within that time must prove it. *Id.*

5. In a prosecution, under art. 2016, Paschal's Digest, of a white person for marrying a negro within this State, or for cohabiting with a negro within this State after an intermarriage in or out of this State, the marriage should have been directly averred in the indictment and positively established by the proof. Cohabitation, without a previous marriage, was not within the said article. *Moore v. State*, 608.

6. The opinion of a witness that the defendant "looks like a white woman" was not sufficient evidence of that fact. *Id.*

UNLAWFUL PURCHASE OF PUBLIC LAND.

1. County surveyors were not among the officials prohibited by the original Penal Code from dealing in public lands; but the Revised Code corrects the omission. *Gray v. State*, 10.

2. See indictment for this offence held bad for uncertainty. *Id.*

V.

VARIANCE.

IDEM SONANS.

1. Variance between the date of the offence as alleged in the affidavit and the date as charged in the information vitiates the whole proceeding. *Swink v. State*, 78.

2. Variance between a bail-bond offered in evidence and its description in the *scire facias* was an objection sufficient to exclude the bond. *Smith v. State*, 160.

3. Indictment named the assaulted party Sofia O., and she so stated her Christian name on her direct examination, but on cross-examination she gave it as Sofra, and when reëxamined stated that she was called Sofia as much as Sofra, or more. *Held*, no misnomer or variance. *Owen v. State*, 329.

4. Variance is a disagreement between the allegation and the proof in some matter legally essential to the charge. *Smith v. State*, 882.

5. In a trial for the murder of a person whose name was alleged to be

VARIANCE — Continued.

unknown, but whom the grand jury named Diamond Bessie, the defence, to raise a question of variance, introduced the foreman of the grand jury to prove that prior to the homicide he saw a woman who, he was told, was "a fast woman named Diamond Bessie," and afterwards heard she had been killed. *Held*, properly excluded, because not sufficient, if proved, to bring the case within the ruling in *Jorasco v. The State*, 6 Texas Ct. App. 238, that a fatal variance is apparent when the proof on the trial of such an indictment shows that the name of the deceased was known to the grand jury when the indictment was found. *Rothschild v. State*, 519.

6. Before the Revised Codes took effect, if an animal was alleged to belong to A., and was proved to belong jointly to him and B., and not under the exclusive control of either of them, the variance was fatal. And in a trial for an offence committed before the Revised Codes took effect, the new provision that ownership may be alleged in any or all of several joint owners cannot apply and cure the variance. *Calloway v. State*, 585; *Hannah v. State*, 664.

VENUE.**CHANGE OF VENUE.****FORGERY.**

1. Affidavit for an information stated in its caption the proper county and the State, and referred thereto for the venue of the offence. *Held*, sufficient. *Strickland v. State*, 84.

2. The reasonable doubt does not apply to the venue of the offence, nor is positive testimony indispensable to the proof of it. *Higbee v. The State*, 2 Texas Ct. App. 407, explained. *Deggs v. State*, 859.

3. The venue of the offence was alleged to be in an unorganized county attached for judicial purposes to the county of W., but the proof showed that the offence was committed in another unorganized county which was attached to the county of M. *Held*, a fatal variance between the allegation and the proof. *Quære*, in case both of the unorganized counties had been attached for judicial purposes to W. County, where the indictment was found. *Prendez v. State*, 587.

VERDICT.

1. A verdict sufficiently designates the penitentiary as the "State prison." *Moore v. State*, 14.

2. The charge to the jury may be looked to for the purpose of ascertaining the offence of which the verdict convicts the accused. *Hutto v. State*, 44.

3. Verdict which found defendant "guilty as charged in the indictment" held sufficient, no objection having been taken to it when rendered. *Curry v. State*, 91.

4. Verdicts are to have a reasonable intendment and construction, and are not to be avoided unless from necessity originating in doubt of their import, immateriality of the issue, or manifest tendency to injustice. *McMillan v. State*, 100; *McCoy v. State*, 379.

5. Misspelling does not vitiate a verdict, when no doubt can be entertained as to the word intended, or of its meaning. *Id.*

6. In assessing a term of years in the penitentiary, the verdict need not direct the confinement of the defendant. *Jones v. State*, 108.

VERDICT — Continued.

7. The amendment of a verdict, with the jury's consent, is authorized by the Code. *Id.*

8. Though verdicts must be entered in the minutes of the court, no file-mark on them is required by the Code. *Williams v. State*, 163.

9. Verdict assessing "a five years in the State prison" held good on a conviction for rape. *McCoy v. State*, 379.

10. Since the Revised Codes took effect, verdicts of conviction for murder in the first degree must assess one of the alternative penalties prescribed for that offence. *Doran v. State*, 385.

11. The presence of the accused, but not that of his counsel, is necessary when a verdict of conviction for felony is received. *Richardson v. State*, 486.

12. Verdict must expressly find whether a special plea of former conviction or former acquittal is true or untrue. *Brown v. State*, 619.

W.**WITNESS.**

ACCOMPLICE TESTIMONY.

EVIDENCE, 14, 15, 16, 17, 18.

PARDON.

In a trial for theft, a person indicted as receiver of the stolen property is not, under the Code of this State, a competent witness for the defence. *Crutchfield v. State*, 65.

ex. J. A. St.

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